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IN THE

Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Law schools are accredited by the Council of the Section of Legal Education of the American Bar Association. The Council establishes and enforces accrediting rules that fix the salaries, terms and conditions of work of the law professoriate. The Council is controlled by economically self-interested members of the professoriate, and operates in secret, with many of its rules and procedures kept hidden even from the ABA's Board of Governors and House of Delegates.

Over 40 states use the Council's accreditation decisions as the determinant of whether a law school's graduates can take the bar examination. The states, however, do not authorize anticompetitive Council rules, procedures and decisions, do not supervise them, do not know of numerous challenged secret rules and procedures used by the Council to make decisions, and have never been petitioned to approve challenged anticompetitive rules, procedures and decisions.

In these circumstances, the first question presented is:

1. Is a private, economically self-interested accrediting body, which acts secretly, wholly immune from antitrust liability for anticompetitive conduct under the state action immunity and *Noerr-Pennington* doctrines?

If certiorari is granted on the first question presented, the following question should also be reviewed to provide full relief in this case:

2. Where an antitrust plaintiff charges an overall conspiracy, which includes price-fixing and other violations, and charges participation in the overall conspiracy by individuals and organizations, is it permissible for the district court to deny discovery on these questions (and on immunity), to disqualify in-house counsel on whom the plaintiff is financially and professionally dependent, and to then rule against plaintiff on the questions as to which it denied discovery?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the district court and in the court of appeals:

Law School Admission Services, Inc.
Law School Admission Council
The Association of American Law Schools, Inc.
James P. White
Nina Appel
Jose R. Garcia-Pedrosa
Laura N. Gasaway
Frederick M. Hart
Rudolph C. Hasl
Carl C. Monk
R.W. Nahstoll
Henry Ramsey, Jr.
Norman Redlich
John E. Ryan
Gordon D. Schaber
Pauline Schneider
Steven R. Smith
Claude R. Sowle
Robert A. Stein
Rennard Strickland
Roy T. Stuckey
Leigh H. Taylor
Frank K. Walwer
Sharp Whitmore
Peter A. Winograd

PARENT COMPANIES AND AFFILIATES

Petitioner Massachusetts School of Law has no corporate parent, subsidiary or affiliate.

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PETITION FOR A WRIT OF CERTIORARI

Massachusetts School of Law at Andover, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court (Pet. App. 1A)[1] is reported at 107 F.3d 1026 (3d Cir. 1997). The opinion of the district court granting summary judgment (Pet. App. 43A) is reported at 937 F. Supp. 435 (E.D. Pa. 1996). The prior opinions of the district court on price fixing, discovery, jurisdiction, recusal and disqualification of counsel are reported at 846 F.Supp. 374 (E.D.Pa. 1994); 853 F.Supp. 837 (E.D.Pa. 1994); 853 F.Supp. 843 (E.D.Pa. 1994); 855 F.Supp. 108 (E.D.Pa. 1994); 857 F.Supp. 455 (E.D.Pa. 1994); 872 F.Supp. 1346 (E.D.Pa. 1994); 895 F.Supp. 88 (E.D.Pa. 1995); and 914 F.Supp. 1172 (E.D.Pa. 1996).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A) was entered on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (Pet. App. 67A).

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[1] "Pet. App." refers to the Appendix, *infra*. "App." refers to the record in the Court of Appeals.

STATEMENT

A. Introduction

This is an antitrust case brought by the Massachusetts School of Law ("MSL") under 15 U.S.C. §§15(a) and 16 against the American Bar Association ("ABA") and persons and organizations charged with conspiring with the ABA. MSL charges the Sherman Act was violated by anti-competitive accreditation standards and procedures used by, and anticompetitive accreditation decisions made by, economically self-interested private actors.

MSL is a young school which provides legal education to the less privileged, including members of the working class, racial and ethnic minorities, and persons in midlife who seek to improve their lot. App. 7-11, 2085-97, 4043-98. MSL focuses on professional skills to a much greater extent than is traditional in law schools, and uses many more judges and expert practicing lawyers as adjunct professors than is traditional. App. 2085-97. To remain affordable to its less privileged student body, MSL charges tuitions that are only about half of the tuitions charged at ABA law schools in New England. The quality of MSL's education has often been praised by judges, lawyers and professors. App. 1613, 1671, 2096.

The ABA is a private organization. App. 2102. Its accreditation function is in the hands of the Council of the Section of Legal Education, which uses an Accreditation Committee. App.2876-78, 2925. The Committee and the Council make the initial determinations of accreditation standards, procedures and decisions, subject to ultimate review by the ABA's House of Delegates. App. 2876-78, 2924-25. It is exceptionally rare for the House not to uphold these initial determinations.

The Council and the Committee thus have enormous

accreditation power. Indeed, through the ABA they have a monopoly of law school accreditation, to the point, for example, where every judge and every law clerk who has or will work on this case is a product of a school that is part of the ABA system. The monopoly over accreditation exists because over 40 states have a rule requiring ABA accreditation before a school's graduates are allowed to take bar examinations (App. 2876), and because the ABA has claimed to the public for decades that its accreditation is a *sine qua non* of quality. App. 41, 2105, 3071-72.

B. The Antitrust Suits Brought By MSL And The Department of Justice.

1. MSL was denied accreditation by the Accreditation Committee and the Council. App. 837, 905. It then filed an antitrust suit charging the defendants with an anticompetitive conspiracy to which all law schools, including MSL, had to conform if they desired to obtain or retain accreditation. The conspiracy's purpose was to enhance the salaries, terms and conditions of work of the law professoriate. App. 2875, 2922. The charged conspiracy included fixing the price of professors' salaries, reducing their hours and types of work, demanding paid leaves of absence, requiring more jobs for full time professors by use of an arbitrary student/faculty ratio, requiring elaborate physical facilities, and boycotting unaccredited schools. App. 1. MSL also charged that maximum possible secrecy was part of the conspiracy and that a small group of economically self-interested insiders controlled the accreditation process for the economic benefit of themselves and their colleagues in the professoriate. App. 1.

2. After filing its suit in November 1993, MSL presented relevant information to the Antitrust Division in January 1994. The Division thereupon conducted an 18 month investigation and, in late June 1995, filed a complaint and an accompanying

Consent Decree. *The Government made almost all of the charges previously made by MSL and, having obtained 544,000 pages of documents from the ABA, expressly said it could prove these charges at trial.* App. 2878-83.

The Government declared that the accreditation process had been used for the improper purpose of "protect[ing] the interests of professional law school personnel," with site inspection teams "at times [being] unduly concerned with the salaries, perquisites and working conditions of their colleagues." App. 2876, 2931. In fact, faculty salaries had been "nearly exclusively" the determinant by which the accreditors judged the competence of a faculty.[2] App. 2927.

The DOJ found that accreditation had been "captured," "controlled and dominated" by a "guild" that had a "direct economic interest" in the results of accreditation, and that had used accreditation "to advance their self interest by limiting competition among themselves and from others." App. 2875-76, 2884. The guild captors were a "small, permanent group of accreditation insiders" who had been in their "positions for many years," with the guild's "day to day operations" having been supervised by the same academic for 24 years. *United States of America v. American Bar Association*, D.C.D.C. C.A. No. 95-1211 (CRR), United States' Response to Supplemental Public Comments, p. 5; App. 2878, 2884, 2926.

The guild captors caused the process to remain secret: the Government found they not only "kept [it] from public view,"

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[2] MSL had long known, because of prior experience of its personnel in the academic world, that the Council's salary standard was the one which, above all, the accreditors would insist be adhered to if there was to be *any* chance of accreditation. The school raised its salaries accordingly. App. 828, 2122-25. MSL mistakenly believed, however, that the Council, pursuant to a standard expressly allowing variances, would allow departures from certain other standards if a program was of high quality. Depositions and other evidence subsequently showed, however, that the standard allowing variances is never followed. App. 2121, 2241-51.

but even kept it "from the supervision of the ABA's Board of Governors and House of Delegates." App. 2884. Due to the "capture" of accreditation by those with "a direct economic interest," said the Government, "the process that had produced the current rules was tainted" and "reform of the entire accreditation process was needed." 60 Fed. Reg. 63766, App. 2878, 2884, 2890, 2925.

C. District Court Proceedings Relating to Immunity.

In the district court, the ABA did not claim state action immunity for its anticompetitive actions. Also, as pointed out by the DOJ in an amicus brief in the Third Circuit, in the district court the ABA *did not even claim* that it had petitioned state courts or boards to authorize or supervise any anticompetitive accreditation rule, procedure or decision challenged by either MSL or the DOJ. *Brief For The United States As Amicus Curiae* in the Third Circuit, pp. 8, 13.

MSL, on the other hand, presented uncontroverted affidavits from a former state supreme court justice and a former state bar examiner detailing a widely known fact (App. 3530, 3533): state supreme courts and boards of bar examiners *did not even know* of challenged anticompetitive ABA rules and procedures, let alone authorize or supervise them or the anticompetitive decisions based on them.

MSL also asked for discovery of evidence from the ABA's files relating to questions concerning authorization of anticompetitive rules and procedures by state bodies, supervision of such rules and procedures by state bodies, and petitioning of state bodies to approve such rules and procedures and decisions based on them. The discovery MSL requested was not granted. It was denied although MSL charged that the Council had used numerous anticompetitive rules and procedures which were kept secret from courts

rather than being authorized or approved by them,[3] and that

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[3] Among the secret rules were the following (App. 149, 183, 2154-2205, 2206-2221, 2227-31, 2241-51, 2879-84, 2926-30, 3033, 4704-06): A school's salaries would automatically be deemed inadequate if not in the top half among ten competing schools. Leaves of absence had to be *paid* leaves. Student/faculty ratios had to be far lower than the 30 to 1 stated in writing to be presumptively permissible. The accreditors used a student/librarian ratio. A parent university was not allowed to "take" more than 20 percent of a law school's tuition to support other branches of the university or for overhead. Law schools, unlike medical schools, could not grant a student credit for working on cases from which a professor received fees. Physical facilities would be called inadequate unless new or newly refurbished and costing tens of millions of dollars. Although full time students supposedly were barred from working more than 20 hours per week for compensation, they could work as much as they wanted on what the Council chose to call pro bono work. And although the Council's standards contain a provision for waivers, waivers in fact were never granted.

Among the charged, secret anticompetitive procedures used by the Council (App. 36-40, 114-18, 149, 203, 311, 357, 837, 905, 911, 2117-22, 2227, 2662-63, 2876-86, 2925-32, 3015, 3021, 3030, 3033, 3348, 5483-84, 5491, 5501-14, 5599, 5603, 5800-07) were that site inspection teams were "stacked" with Council activists to insure denial of accreditation to schools the Council disfavored, site teams were dominated by economically self-interested professors, the section of *ABA* site reports dealing with faculty was *always* written by a representative not of the ABA, but of the Association of American Law Schools, which was admitted on deposition by its leaders to be a defacto trade association for professors rather than a true organization of schools, members of site teams and of the Accreditation Committee had conflicts of interest, the Council would withhold needed comparative information from schools it disfavored and procedural obstacles were placed in the path of such schools, site teams would write slanted and sometimes outright false reports, accreditation rules were applied inconsistently to punish schools the accreditors disfavored while rewarding those it favored, schools the accreditors favored were allowed to participate in the selection of the chairmen and members of their site teams, and schools which received very bad inspection reports would nonetheless be accredited if and as soon as they hired as dean, at a large salary, one of the "small, permanent group of accreditation insiders" or the spouse of such a person.

the ABA never petitioned the courts to approve its rules, procedures or decisions. The DOJ, of course, specifically found that the Council kept accreditation matters secret even from the ABA's Board of Governors and House of Delegates.

D. District Court Proceedings Relating To Matters Other Than Immunity.

To succeed on the merits, MSL had to obtain discovery of evidence from the ABA's files showing an overall conspiracy, including price fixing, to which every law school including MSL had to conform in order to obtain accreditation.

MSL's requests for this discovery were repeatedly denied by the district court, whose view was that the ABA is widely thought to be "quite good at setting standards" (Pet. App. 64A), and MSL was thus trying to use discovery to "bluff, bluster, bludgeon and bully" its way to the "rewards [of] the undeserving." [4] *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 872 F.Supp. 1346, 1371 (E.D.Pa. 1994).

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[4] The relevant committee of the Department of Education, and the deans of more than 100 Council-accredited schools, do not agree with the District Court's unsupported view, as shown by a publicly available transcript that was lodged with the Third Circuit. The National Advisory Committee of DOE is an expert body that deals with approximately 90 accrediting agencies. The American Law Deans Association ("ALDA") began as 14 deans of mainly prestigious schools and has grown to over 100 deans. After studying the Council's accreditation rules, including rules challenged by MSL, NAC members have called Council standards, among other things, arbitrary, lacking in any relation to educational quality,and far more restrictive than in other professional fields. The original 14 deans castigated Council accreditation for being a straitjacket that prevents *all* law schools from using new or different methods (App. 1686), and ALDA subsequently said the Council uses unjustifiable criteria such as its arbitrary student/faculty ratio, and forces all schools to use methods which often are counterproductive to educational quality.

Only a few months after MSL filed suit, *and prior to any discovery of any type*, the district judge ruled the ABA had not fixed salaries. *Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 853 F. Supp. 837, 840 (E.D. Pa. 1994). (The Government later said it could prove the ABA *had* fixed salaries. App. 278-79.) The district judge then used this pre-discovery ruling as the basis for denying MSL any discovery on its charge of an overall conspiracy, including price fixing, to which every school, including MSL, had to conform if it were to have any chance of accreditation.[5] App. 828, 2122-25. He instead permitted MSL only limited discovery which ultimately consisted, in relevant part, almost entirely of documents merely relating to MSL itself and in the ABA's file on MSL itself. *See, e.g.*, court orders entered May 17, 1996 and May 23, 1996.

When denying MSL discovery, the district judge denied it discovery of the incriminating documents which the ABA produced to the government, and on which the government based its charges. The district judge also denied MSL discovery on personal jurisdiction (*Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 853 F.Supp. 837 (E.D. Pa. 1994), but dismissed the individual defendants for lack of such jurisdiction. *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 846 F.Supp. 374 (E.D.Pa. 1994); *Massachusetts School of Law at Andover, Inc., v. American Bar Association, et. al.*, 853 F.Supp. 843 (E.D.Pa. 1994). He did not grant MSL discovery on participation in the overall conspiracy by non ABA organizational defendants, yet dismissed them from the case for alleged lack of participation. Pet. App. 65A. And

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[5] Under the district court's rulings, MSL could charge and obtain discovery on price fixing and the overall conspiracy *only if it had been denied accreditation because its salaries were low, and not if it had raised its salaries to levels demanded by the conspiracy in order to have even a chance of accreditation.*

after MSL sought his recusal, he cut off even limited discovery he had previously said would be granted. App. 1432, 4436.

The district court also disqualified MSL's experienced, inside antitrust counsel who were serving without fee. *Massachusetts School of Law at Andover, Inc. v. American Bar Association, et. al.*, 872 F.Supp. 1346, 1379 (E.D. Pa. 1994). This forced MSL to use expensive outside counsel who knew nothing about accreditation. Dozens of depositions -- which occurred in the first year of the case -- thus had to be taken or defended by outside counsel who were ignorant of subjects that were covered therein and that were important notwithstanding limitations on the depositions arising because of the court's orders[6] (e.g., MSL was not allowed to ask questions regarding its charges of an overall conspiracy and price fixing, both of which the Government later said it could prove (App. 2878-84)).

Although MSL depleted its funds by multimillion dollar expenditures on outside counsel, it simply could not afford the additional millions of dollars it would have cost to bring outside counsel up to speed quickly enough.

E. The District Court's Grant Of Summary Judgment.

After the foregoing rulings, the district judge granted summary judgment against MSL. Purportedly relying on the *Noerr* case (*Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)), he ruled the private ABA accreditors were immune from liability for the massive financial injuries MSL has suffered. To the extent injury arose because state rules use the Council's accreditation decisions as the determinant of eligibility for bar examinations,

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[6] The ABA, on the other hand, was represented at depositions by experienced antitrust counsel who had worked on ABA accreditation for up to two decades, as the district judge knew.

he held the state rules are a supervening cause of injury which eliminates all liability under *Noerr*. Pet. App. 47A-52A. To the extent independent injury arose because denial of accreditation stigmatized MSL in the marketplace, he held that under *Noerr* such injury was "incidental" to the allegedly "primary" injury caused by state rules, since the ABA assertedly did not attempt "*directly to persuade*" anyone to boycott MSL. Pet. App. 53A-56A. (emphasis in original). Finally, he ruled that the independent stigmatic injury is the result of free speech. Pet. App. 56A-64A, 65A.

F. The Court of Appeals' Decision.

The court of appeals affirmed in every particular. Pet. App. 1.

1. The court ruled that the accreditors were immune on the ground of state action immunity. Pet. App. 21A. It held that because *state* bodies use the accreditation decisions of the private Council as the determinant of eligibility to take the bar, "*the clear articulation and active supervision requirements . . . are inapplicable.*" *Id.* at 21A (emphasis added). MSL's injury from ineligibility to take bar exams, it held, flows solely from action by the states, and not at all from the Council's anticompetitive decisions used by the states as the determinant of eligibility. *Id.* at 19A-24A, 23A n.9. The court so ruled although it subsequently acknowledged that the Council's accreditation process "is entirely private conduct which has not been approved or supervised explicitly by any state." *Id.* at 29A.

2. Independent stigmatic injury arising in the marketplace was held immune under the petitioning doctrine of the *Noerr* case. *Id.* at 24A-28A. The Third Circuit held *Noerr* applicable on the ground that the Council's accreditation activities -- challenged by MSL *because they set the salaries, terms and conditions of work of law professors* -- are not, as in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492

(1988), "commercial practices of economically interested actors." *Id.* at 26A. Instead, said the court, "the ABA engaged in petitioning activity, and the stigma injury which MSL suffered was incidental to that activity." *Id.*

The only alleged actual petitioning of courts the court could point to were (i) unknown, unspecified petitioning actions engaged in earlier in the century (primarily in the 1920s and 1930s), *long before the enactment and enforcement of the 1973 standards challenged by MSL and the Department of Justice*, (ii) the action of the ABA in merely notifying courts of whether it has accredited a school, (iii) a brief defense of the Council's standards by an ABA official interviewed for a 1994 article in the Boston Globe, and (iv) the fact that, *in an internal debate on the floor of the ABA House of Delegates*, a Council activist claimed to fellow delegates that MSL is a miserable institution to which no Delegate should send a child. *Id.* at 26A-28A

The interview and the internal debate in the House of Delegates were said to be "indirect" petitioning of courts. *Id.* at 28A. Because they purportedly were indirect petitioning of courts, they did not give rise to an exception to *Noerr* which the Third Circuit said would exist if the "ABA 'attempted directly to persuade anyone not to deal with' MSL." *Id.* at 27A.

Also, although Council accreditation is run by law school *employees* who benefit from higher salaries -- including deans, professors and librarians -- the Third Circuit stated that at first glance MSL's claim of a conspiracy to raise law schools' costs "makes no economic sense," and arguably MSL must meet the heavier evidentiary burden applying when one asserts an economically irrational conspiracy. *Id.* at 29A, 30A. Then, purportedly applying ordinary standards, the court rejected the evidence showing that, because of the charged conspiracy, MSL had to and did increase its salaries in order to have even a chance of accreditation. App. 828, 2122-25.

3. The Third Circuit upheld the district court's refusal to

allow MSL discovery of documents showing whether, as charged by MSL and the DOJ, there was a conspiracy which included price fixing *and which every law school had to conform to in order to have a chance of obtaining accreditation*. *Id.* at 14A-18A. In this connection, the Third Circuit ruled the district judge was justified in denying MSL discovery of documents produced to the DOJ (*id.* at 16A-17A), because MSL had sued *before* the DOJ, and the district judge had created "the existing discovery framework" denying MSL evidence it needed to prove there was a conspiracy to which it was required to conform to have even a chance of accreditation. *Id.* at 17A.

The Third Circuit also ruled it proper for the district judge to deny MSL discovery of evidence on the fixing of salaries because (i) the ABA is a professional society whose rules courts are slow to condemn as *per se* illegal, and (ii) the ABA's file on MSL had not shown accreditation was denied because MSL's salaries were too low. *Id.* at 14A-16A. The Third Circuit thereby upheld the district court's view (n.5, *supra*) that MSL could obtain discovery essential to proving the charged conspiracy only if it had been denied accreditation due to low salaries, but not if it had been forced to raise its salaries to levels demanded by the conspirators in order to have even a chance of accreditation. The Third Circuit acknowledged, however, that evidence did show that, when accrediting law schools, the Council would cite salaries when they were low (*id.* at 16A); this acknowledgment confirmed MSL's claim that, to have even a chance of accreditation, it had had to conform to the guild salary standard which the DOJ said was "nearly exclusively" the accreditors' determinant of a faculty's quality. App. 2927.

4. The Third Circuit also upheld the district court's other decisions on discovery, jurisdiction, participation in the

conspiracy, disqualification of inside counsel and recusal.[7]

REASONS FOR GRANTING THE PETITION

1. The Third Circuit's Decision Establishes A Sweeping New Antitrust Immunity, Virtually *Per Se* In Character, Which Threatens Competition In Large Areas Of The Economy.

The Third Circuit's decision establishes a sweeping new antitrust immunity for price fixing agreements, boycotts and other anticompetitive actions in a wide range of fields.

There are an enormous number of private organizations throughout the economy which set accreditation or certification standards, or which make economic decisions, that are in some way used and made effective by state and federal bodies.[8] These private groups' standards and decisions

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[7] Thus the court held (Pet. App. 34A-35A) that the evidence was insufficient to demonstrate participation in a conspiracy by two organizations shown to be extensively interested in promoting the welfare of law professors (the AALS and the LSAC), although MSL had been denied discovery relating to their participation. App. 4431-32. The court held that dismissal of individual defendants for lack of jurisdiction was appropriate although MSL had been denied discovery on jurisdiction. Pet. App. 36A-38A The court ruled it proper for the district judge to disqualify the inside counsel on whom MSL was vitally dependent (*id.* at 41A-42A) and for the trial judge not to recuse himself. *Id.* at 38A-41A.

[8] This occurs, for example, with regard to dentistry, architecture, education, medicine, veterinary medicine, engineering, chiropractic, interior design, marriage and family therapy, mental health, nursing, occupational therapy, psychology, social work, librarianship, optometry, funeral service, innumerable mechanical or industrial devices and products, liquor prices, insurance prices, and many other services and products. *See*, e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988);

often involve prices, product or service requirements, the determination of who, if anyone, will be subjected to refusals to deal, and other crucial competitive matters. *See, e.g.*, the cases cited in note 8, *supra*.

The Council of the Section of Legal Education is one of these private organizations. The essential characteristics of the Council have been well summarized by the DOJ. As the Government said, the Council's accreditation process was captured by an economically self-interested guild which used it to better the economic lot of themselves and their colleagues while shutting off competition both among guild members and from outsiders. App. 2875-76, 2878-79, 2884, 2890, 2931, 2933. The Council operated secretly, was run by a "small, permanent group of accreditation insiders," and "artificially inflated faculty salaries and benefits, and raised the cost of a law school education." App. 2884, *United States of America*

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951); *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519 (3d Cir. 1994); *Sessions Tank Liners, Inc. v. Joor Manufacturers, Inc.*, 17 F.3d 295 (9th Cir. 1994); cert. denied 513 U.S. 813 (1994); *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1994), cert. denied 510 U.S. 992 (1993); *Wilk v. American Med. Ass'n.*, 895 F.2d 352 (7th Cir. 1990); *Schachar v. American Academy of Opthamology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96 (E.D. Va. 1989); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F.Supp. 716 (1986); *See also, e.g.*, the following state regulations: 59 FL ADC 59 Q-2.014; MN ADC 3100.1150; MN ADC 3100.1160; 234 MA ADC 2.01; 16 CA ADC s. 116. 117; 61 FL ADC 61G1-13.003; MN ADC 1800.1000; MN ADC 1800.2100; 9 FL ADC 9B-66.002; 61 FL ADC 61G15-20.001; 59 FL ADC 59-1.008; 605 MA ADC 3.04; 262 MA ADC 2.02; 244 MA ADC 6.04; 8 NY ADC 76.1; 8 NY ADC 77.1; 59 FL ADC 59R-30.009; 105 MA ADC 900.007; 251 MA ADC 3.03; 59 FL ADC 59P-11.008; 8 NY ADC 62.1; 59 FL ADC 59V-4.004; 61 FL ADC 61 G8-25.001; 603 MA ADC 7.01-7.05; 243 MA ADC 5.02-5.04

v. American Bar Association, D.C.D.C. C.A. No. 95-1211 (CRR), United States' Response to Supplemental Public Comments, p. 5; *Brief For The United States As Amicus Curiae* in the Third Circuit, p. 14, n.5. The Council used secret rules and arbitrary and inconsistent procedures. The Council did not petition state courts or boards, by means of any memorandum, brief, or other means of petitioning, *to authorize or approve the anticompetitive rules and procedures challenged by MSL and the DOJ, and did not even claim on summary judgment to have done so*, as the DOJ pointed out. *Id.* at 8.

The Council's anticompetitive decisions were used by states as the determinant of entry to a profession without any governmental authorization or supervision of its decisions or their underlying anticompetitive rules or procedures, as the Third Circuit acknowledged (Pet. App. 21A), and without governments even *knowing* of underlying rules and procedures. App. 3530, 3533. The Council's anticompetitive decisions also had great impact of their own accord in the marketplace since, for lack of an alternative, the public assumed the Council's decisions to be the disinterested views of an objective, independent third party, as often occurs in similar circumstances.[9]

Despite all this, the Third Circuit ruled the Council wholly immune from antitrust liability. Such ruling amounts, for practical purposes, to *virtual per se* immunity. For under the court's decision, state action immunity exists if state bodies use private decisions *whose underpinnings they are totally unaware of*, and *Noerr* immunity exists if private groups so much as notify the state of these decisions, or give a newspaper interview, or make an internal speech. This case, moreover, is the second time since 1991 that the Third Circuit,

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[9] Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029 (1991); Havighurst and Brody, *Accrediting and the Sherman Act*, 57 Law and Contemporary Probs. 199 (1995).

contrary to this Court's decisions, found antitrust immunity even though states did not actively supervise private anticompetitive decisions which they used. The other case was the *Ticor* proceeding, in which this Court squarely rejected the Third Circuit's extension of antitrust immunity. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991), reversed, *FTC v. Ticor Title Ins. Co., supra.*

It is clear that the Third Circuit's opinion--especially because it immunizes an organization with the notable characteristics described above -- is pregnant with potential destruction of competition in large segments of the economy. For, as said, throughout the economy there are private groups which set standards or make decisions used by governmental bodies, and whose standards and decisions control scores of billions of dollars of commerce. *See* also Bork, *The Antitrust Paradox,* at 347, 349. These private groups' standards and decisions often determine critical competitive issues such as prices, product or service requirements, and refusals to deal. The Third Circuit's decision is an open invitation for such private groups to destroy competition with impunity so long as some governmental bodies use their decisions in some way, without any authorization, supervision or even knowledge of their anticompetitive rules and procedures, and without the private bodies petitioning for approval of those rules and procedures.[10]

2. The Third Circuit's Decision Is Contrary To Decisions Of This Court.

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[10] Under the Third Circuit's decision, the Council could secretly require law schools to pay every dean $200,000 in annual compensation, and boycott any school not doing so, yet remain immune from antitrust liability. This example is close to what occurred in fact, and concretely illustrates the type of highly anticompetitive action that a host of private groups would be able to take with impunity under the Third Circuit's ruling.

This Court repeatedly has recognized that adoption of private economic decisions by governmental bodies is rife with potential destruction of competition by private determinations. It has thus said that the Sherman Act is applicable in "hybrid" situations where governmental "mechanisms merely enforce private marketing decisions" and private actors are granted "`a degree of regulatory power.'" *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986). In these "hybrid" situations, government takes some action which renders private commercial decisions effective: government may render them effective, for example, (i) by enacting a private group's standards into law verbatim or with some amendments (as in the *Allied Tube*, *Hydrolevel*, *Lawline* and *Sessions* cases, *supra*), (ii) by using price levels or other transaction terms set by the private actors (as in the *Ticor*, *Midcal*, and *Schwegmann* cases, *supra*), or (iii) by using the private actors' decisions to determine entry into a business or profession (as in this case and the *McKeesport* case, *supra*).

The problem of government making private anticompetitive action effective arose in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which a regulatory agency approved and made effective a private anticompetitive tariff requiring consumers to obtain bulbs from Detroit Edison. The Court ruled Detroit Edison could be liable because "the option to have, or not to have, such a program is primarily the respondent's, not the commission's." 428 U.S. at 594. The Court found "there is nothing unfair" in concluding that Detroit Edison's "participation in the decision [to have the anticompetitive program] is sufficiently significant to require that its conduct...conform to federal law." *Ibid.*

Additionally, the *Noerr* doctrine was held not to provide immunity even though Detroit Edison had expressly petitioned the agency by requesting approval of its tariff: "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and therefore require that the proposal be implemented...is a

sufficient reason for conferring antitrust immunity...." *Id.* at 601.

Fleshing out *Cantor's* doctrine that a private party can be liable where it has "sufficiently significant" participation in a decision made effective by state law, this Court, in a series of cases, established that for the private party to be immunized by the implementing state action, the state must clearly and affirmatively authorize the anticompetitive action and must actively supervise the anticompetitive conduct. *Ticor*, *supra*; *Patrick v. Burget*, 486 U.S. 94 (1988); *Midcal*, *supra*. *These are the precise requirements which the Third Circuit held to be completely irrelevant in this case*, and which concededly are absent here. These requirements are intended to insure that "anticompetitive acts were *truly* the product of *state regulation*" and that the state "played a substantial role *in determining the specifics*," rather than the acts being in reality "simply [an] agreement among private parties" and simply "promot[ing] the party's individual interests." *Patrick*, 486, U.S. at 100, 101; *Ticor*, 504 U.S. at 634-35 (emphasis added). "*Much as in causation inquiries*," the Court has said, "the analysis [of active supervision] *asks whether the state has played a substantial role in determining the specifics of the [anticompetitive] economic policy.*" *Ticor*, 423. The states played *no* such role here.

By establishing requirements which insure that private rules vitiating competition are the product of and truly "further state regulatory policies," *Patrick*, 100-101, rather than merely "casting...a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement," *Midcal*, *supra*, 445 U.S. at 243, this Court consistently has sought to ensure that states not do what was said to be impermissible in *Parker v. Brown*, 317 U.S. 341 (1953). A state, said *Parker*, can "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...." 317 U.S. at 351.

Here the result forbidden by *Parker* is exactly what the

Third Circuit approved. For it is tantamount to allowing mere authorization of violations, or mere declaration of their legality, to grant immunity because the states use the Council's private anticompetitive decisions, when the states neither authorize nor supervise the Council's anticompetitive standards, procedures and decisions, as the Third Circuit acknowledged to be the case here, do not play any role in determining the specifics of the Council's policies, do not even know of them, and surely do not know of rules and procedures that were kept secret even from the ABA's Board of Governors and House of Delegates.

Further implementing its immunity jurisprudence where states make private anticompetitive decisions effective, this Court has rejected *Noerr* immunity (as in *Cantor*) even where a private body's standards were widely adopted into law by being incorporated verbatim or with slight amendments into statutes and ordinances. Important in this connection, as it also was in the *Hydrolevel* case, *supra*, was that economically self-interested actors made the private party's decisions and that improper procedures such as stacking of committees were employed.

In *Allied Tube*, *supra*, which involved immunity for independent marketplace injury in a situation where there was "predictable adoption of [the private body's] Code into law by a large number of state and local governments" (486 U.S. at 502), this Court squarely rejected *Noerr* immunity. It noted that the standards set by private groups "have a serious potential for anticompetitive harm" because, as in the present case, they "deprive some consumers of a desired product, eliminate quality competition, exclude rival products, or facilitate oligopolistic pricing." *Id.* at 500, 500 n.5. The Court was especially concerned that the private group in *Allied Tube*, as is true in its entirety here, was "composed, at least in part, of persons with economic incentives to restrain trade." *Id.* at 501. It said that "the hope of procompetitive benefits [from standards] *depends upon the existence of*

safeguards [wholly lacking here] sufficient to prevent the standard-setting process from being biased by members with independent interests in restraining competition." *Id.* at p. 509.

The Court relatedly stated that a process *which is secret and partisan (as here)*, rather than open and competitive, *and which involves market power (as here)*, will not qualify for immunity:

> *Unlike the publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process.* The validity of conduct within that process has long been defined and *circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See supra,* at 500. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations *is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner, offering procompetitive benefits . . . the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena* or in the adversarial process of adjudication . . . . Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, *for it in part involves the exercise of market power*. . . .Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is 'political,' we think that, *given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact.* Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, *so the antitrust laws*

> *should not necessarily immunize what are in essence commercial activities simply because they have a political impact.* 486 U.S. at 506-507 (emphasis added).

Thus, said the Court, given that "petitioner was at least partially motivated by the desire to lessen competition" (as here), and "stood to reap substantial economic benefits from making it difficult for respondent to compete" (as here),

> "the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts *must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process.*" *Id.* at 509 (emphasis added).

Here too the context and nature of the defendant's conduct -- designed to fix salaries, terms and conditions of work -- is such that it should be "evaluated under the standards of conduct set forth by the antitrust laws."

Nor did the *Allied Tube* Court accept the argument, approved by the Third Circuit, that conduct occurring *within* the standards setting body should be immune under *Noerr*, as an *indirect* effort to petition governments, because governments routinely adopted the private body's codes into law and efforts within the body were therefore "the most effective means of influencing legislation." *Id.* at 502. (This argument had previously been rejected by the Second Circuit in *Allied Tube*, in a decision squarely conflicting with the Third Circuit's view here and affirmed by this Court. *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938, 945-46 (2d Cir. 1987), aff'd, *Allied Tube*, *supra*. Other courts of appeal are likewise in conflict with the Third Circuit on this point. *Litton Systems, Inc. v. AT&T*, 700 F.2d 785, 807, 807-808 n.32 (2d Cir. 1983); *Virginia Academy of*

Clinical Psy. v. Blue Shield of Va., 624 F.2d 476 (4th Cir. 1980).)

In *Allied Tube*, the Court rejected the "indirect petitioning" argument because it would free private parties to enter all manner of anticompetitive agreements (as here) on the ground that they were intended to influence governmental action (as occurred here):

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. . . . Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.[11] 486 U.S. at 503.

This Court also rejected the argument, approved by the Third Circuit, that conduct within a private process should be immunized because it is "incidental" to efforts to influence government or because the defendant did not attempt "directly to persuade" consumers or others to boycott the plaintiffs. 486 U.S. at 505. The context and nature of an association's processes were distinguished from *Noerr* because, "*Unlike the*

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[11] This language subsequently was quoted with approval in *FTC v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411, 425 (1990).

publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, but within the confines of a private standard-setting process," as occurred in this case. *Allied Tube*, *supra*, at 506.

Finally, *Allied Tube* made clear that the comment in *Noerr* regarding the absence of an effort "'directly to persuade anyone'" to boycott the plaintiff relates to a situation where "'*all the evidence in the record...deals with the railroads' [massive] efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents* discuss in one way or another the railroads' charges'" against the truckers. 486 U.S. at 505 (emphasis added). It was railroads' "classic 'attempt . . . to influence legislation *by a campaign of publicity*,'" said the Court, which caused the "'incidental'" protected effect of direct injury. 486 U.S. at 505 (emphasis added). For there was a massive "*political* figh[t]" in which groups inevitably "'will get hurt by the arguments that are made.'" 486 U.S. at 505 (emphasis added). Here, of course, there was no political battle in a public arena, but rather the use of a private and secret process.

Given the "context and nature" of the "incidental" injury in *Noerr*, other Circuits, in conflict with the Third Circuit, have found liability where a standards setting body did *not* attempt "directly to persuade" anyone not to deal with particular plaintiffs, but simply enacted rules, allegedly necessary for quality, that resulted in individual plaintiffs being harmed. *Wilk v. American Med. Ass'n.*, 895 F.2d 352 (7th Cir. 1990). That is precisely what occurred here.

3. The Lower Courts Need Further Guidance On The Recurring Antitrust Immunity Issues Decided By The Third Circuit.

As said, the Third Circuit's decision immunizing even an organization with the Council's characteristics is pregnant

with possibilities of vitiating competition in large areas of the economy. In this regard, Judge Bork has warned of the danger from "[T]he modern profusion of governmental authorities [which] offers almost limitless possibilities for abuse," coupled with "the claim by predators that they are merely exercising their First Amendment rights to petition and to influence government." Bork, *The Antitrust Paradox*, 347, 349. Professor Elhauge, in the Harvard Law Review, has said that there is "no overarching theory to guide [courts'] resolution of the inevitable doctrinal ambiguities" of the state action immunity doctrine, and that *the judicial focus should be placed on the financial interests of private actors*. Elhauge, *The Scope Of Antitrust Process*, 104 Harv. L. Rev. 668, 675, 685, 687, 689, 693, 696, 703, 703-04 (1991). Where financially self-interested private actors set the rules for their rivals, there is no occasion for immunity.

Here the Third Circuit's opinion contains no discussion, and the other lower court cases from which it claimed support[12] contain relatively little discussion, of underlying principles enunciated by this Court. There was no consideration by the Third Circuit, for example: (i) of the need to determine, "[m]uch as in causation inquiries," whether it is the state or a private group which is fundamentally or "substantially" responsible for anticompetitive acts, (ii) of whether a private group was comprised of economically self-interested actors, (iii) of whether the private group operates secretly or in the open, or (iv) of whether the private group uses procedures which are fair and conduce to unbiased decisionmaking. Given that such fundamental considerations are frequently absent from lower court opinions -- despite this Court's reliance on them -- a decision is needed from this Court to reaffirm that they must be the basis of principled decisionmaking in this area.

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[12]They include *Lawline*, *supra*; *Sessions*, *supra*; *Sherman*, *supra*; and *Zavaletta*, *supra*.

The need for careful evaluation of these factors is particularly evident with regard to the legal profession. As shown by the Third Circuit's reliance on *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), a view has grown up that lesser standards are applicable to the legal profession than to other fields, and that lesser standards are applicable where state courts are involved instead of other state bodies.

Yet, in *Hoover*, which involved a challenge to the grading and formulation of a bar examination, this Court took pains to emphasize that (i) the state supreme court *itself* established the responsible committee, and its members therefore were state officers, (ii) the state court *itself* specified the subjects to be tested and the qualifications required of bar applicants, (iii) the state court *itself* had known of and "*itself* approved the particular grading formula," and (iv) the state court *itself* gave individualized review to disappointed applicants. 466 U.S. at 572, 576, 577 (emphasis added). *There was no such state knowledge and supervision here.*

Bates involved a challenge to a ban on attorney advertising. As this Court emphasized in *Hoover* and *Midcal*, the state supreme court in *Bates* specifically "had incorporated the ABA's advertising prohibitions into the local Supreme Court Rules." *Hoover*, 466 U.S. at 571. It thus knew of them (unlike the present case). The challenged advertising rules also "reflect[ed] a clear articulation of the State's policy" against lawyer advertising "*and were subject to pointed re-examination by the policy maker -- the Arizona Supreme Court*" (again unlike the challenged rules here). *Midcal*, 445 U.S. at 105 (emphasis added).

Thus, *Hoover* and *Bates* were at pains to insure that it was the state, rather than a private group, which was responsible for challenged anticompetitive rules. This Court should reaffirm that principle here, and should make clear that the legal profession is not the beneficiary of specially lenient rules that provide it with immunity denied others.

4. The Third Circuit's Decision Threatens Not Only Private Enforcement Of The Antitrust Laws, But Government Enforcement As Well.

As shown, the Third Circuit's decision immunized the defendants against private enforcement action. But the decision also appears to immunize private actors against state or federal antitrust enforcement, thereby increasing the potential for damage to competition throughout the economy and causing questions to be raised as to whether the Government had a sustainable case against the ABA.

The Government takes the position that, under *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 at 225-26 (1940), it can bring a case challenging private agreements regardless of whether states give effectiveness to those agreements. But the Third Circuit has ruled that an association's internal private processes such as internal debates are indirect petitioning of government. It is those internal processes by which anticompetitive agreements are made and enforced. If internal processes are constitutionally protected indirect petitioning of government, then the DOJ and states will be as unable as private parties to challenge anticompetitive conduct arising and enforced in those processes. For governmental agencies can no more override constitutionally protected processes than private parties can.

5. Private Antitrust Enforcement Is Threatened By The Third Circuit's Affirmance Of Procedural and Substantive Rulings Under Which It Is Virtually Impossible For A Private Plaintiff To Succeed.

The Court has stressed that private antitrust plaintiffs fulfill the important role of private attorneys general enforcing the antitrust laws, *Atlantic Richfield v. U.S.A. Petroleum*, 495

U.S. 328, 345 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985); *Hawaii v. Standard Oil*, 405 U.S. 251, 262 (1972), and has said private actions are "a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968). It is common knowledge, moreover, that potential defendants often fear and are deterred by the prospect of civil liability much more than by government actions, which often end in consent judgments.

So important is private enforcement to maintaining competition under the antitrust laws that even in the legislative history of the Tunney Act -- which deals with governmental consent decrees and therefore is not the first place one would expect to find concern for *private* enforcement -- Congress did express deep concern over the inability of private parties to sustain a case in view of "the deep pockets of many corporate defendants," the "neutralization" by consent decree of "the only plaintiff with resources adequate to the task of protracted litigation" (the Government), and the "profound impact upon the ability of private plaintiffs to recover" when left "to their own resources." 119 Cong. Rec. 3451, 3452 (1973).

The course of proceedings in the trial court here was a paradigm of the reasons for concern that private plaintiffs will be unable to effectively play the role of private attorney general, which is crucial to upholding competition in the economy under the Sherman Act.

As noted above, the district court ruled at the inception of the case, *before any discovery*, that there was no evidence of price fixing, and then used that ruling to deny discovery of the evidence needed to show there was an overall conspiracy, including price fixing, which MSL had to conform to if it were to have a chance of receiving accreditation. The district court concomitantly refused to allow discovery of incriminating documents produced to the Government; this refusal was

contrary to extensive federal law.[13] The district court refused to allow essential discovery on questions relating to immunity, the ground on which MSL lost the case. It dismissed individual defendants on jurisdictional grounds, and organizational defendants for alleged lack of participation in the conspiracy, without allowing essential discovery on the questions. After MSL sought its recusal, it cut off even limited discovery it previously had said would be taken. It crippled MSL's efforts by disqualifying highly experienced inside antitrust counsel who were serving without fee, and forced MSL to use expensive outside counsel whom MSL could not afford to educate quickly enough -- dozens of important depositions thus had to be taken and defended by lawyers who knew little about accreditation (while the ABA used lawyers having up to 20 years experience with accreditation).

Such rulings, now upheld by the Third Circuit, undermine the ability of private plaintiffs to enforce the antitrust laws: under such rulings, it is difficult to see how any antitrust plaintiff could succeed, regardless of how meritorious its case is. The now existing precedents for such rulings in the courts

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[13] *In re NASDAQ Market-Makers Antitrust Litig.*, 929 F.Supp. 723, 725-726 (S.D.N.Y., 1996); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980); *In re Domestic Air Transp. Antitrust Litig.*, ("Domestic Air II"), 142 F.R.D. 354 (N.D. Ga. 1992); *In re Domestic Air Transp. Antitrust Litig.* ("Domestic Air I"), 141 F.R.D. 556 (N.D. Ga. 1992). The practice of allowing private parties to discover documents previously provided to the government has also been followed in numerous cases in which there are no reported opinions. *See In re Residential Doors Antitrust Litig.*, 900 F.Supp. 749, 756 (E.D. Pa. 1995); *In re Electric Weld Steel Tubing Antitrust Litig.*, C.A. No. 79-4628 (E.D. Pa. Feb.28, 1980); *In re Independent Gasoline Antitrust Litig.*, MDL 267 (D. Md. July 19, 1977); *In re Folding Carton Antitrust Litig.*, MDL 250 (N.D. Ill. July 2, 1976); *In re Small Bags Antitrust Litig.*, MDL 360 (E.D. Pa. 1979); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 269 F.Supp. 540 (E.D. Pa. 1967).

below violate Congress' desire, and the need, for effective private enforcement of the antitrust laws, and call for an exercise of this Court's power to oversee the fairness of proceedings in the lower courts. *Perma Life*, *supra*, at 136 ("Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States, we granted certiorari.")

CONCLUSION

Petitioner is a small, young law school founded to give men and women of limited means an opportunity to participate in the legal profession. It has suffered extensive injury from the conduct of a powerful private group of economically self-interested actors who stifle innovative, lower-price competition. They do this by using anticompetitive accreditation rules to protect a system that, in Judge Posner's phrase, is "artificially sustained, indeed bloated." Posner, *Overcoming Law*, 100 (1995). No state has considered, much less approved, their challenged anticompetitive conduct, much of which is secret. Nor has the public had any voice in the matter.

For the sake of present and future students and of the public they will serve, and for reasons set forth in this Petition, including the sweeping, widely applicable new antitrust immunity created by the Third Circuit's decision, this Court should grant certiorari and reverse the Third Circuit's elimination of Sherman Act protection in the important field of legal education.

Respectfully submitted,

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May 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1792

MASSACHUSETTS SCHOOL OF LAW
AT ANDOVER, INC.
v.
AMERICAN BAR ASSOCIATION; LAW SCHOOL ADMISSION SERVICES, INC.; LAW SCHOOL ADMISSION COUNCIL; THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC.; JAMES P. WHITE; NINA APPEL; JOSE R. GARCIA-PEDROSA; LAURA N. GASAWAY; FREDERICK M. HART; RUDOLPH C. HASL; CARL C. MONK; R.W. NAHSTOLL; HENRY RAMSEY, JR.; NORMAN REDLICH; JOHN E. RYAN; GORDON D. SCHABER; PAULINE SCHNEIDER; STEVEN R. SMITH; CLAUDE R. SOWLE; ROBERT A. STEIN; RENNARD STRICKLAND; ROY T. STUCKEY; LEIGH H. TAYLOR; FRANK K. WALWER; SHARP WHITMORE; PETER A. WINOGRAD

Massachusetts School of Law at Andover, Inc. ("MSL")
Appellant.

BEFORE: BECKER, MANSMANN, and GREENBERG,
Circuit Judges.

(Filed February 28, 1997)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

This case is before this court on appeal from an order of the district court granting summary judgment on all counts to the appellees in this antitrust action brought against them by the Massachusetts School of Law at Andover, Inc. ("MSL"). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337, and this Court has jurisdiction under 28 U.S.C. § 1291. This appeal principally presents a number of questions regarding the scope of immunities from the antitrust laws and related antitrust discovery issues. An examination of the parties and conduct in question is first necessary.

I. FACTUAL AND PROCEDURAL HISTORY

A. *The Parties*

MSL has been operating a law school in Massachusetts since 1988. The Board of Regents of Massachusetts authorized MSL to grant the *J.D.* degree in 1990. This authority allowed MSL's graduates to take several bar examinations, including that in Massachusetts. MSL has the stated policy of providing low-cost but high quality legal education and attracting mid-life, working class, and minority students. MSL facilitates this policy with its admissions procedure and a tuition of $9,000 per year. Many of MSL's policies and practices conflict with American Bar Association ("ABA") accreditation standards, and MSL aggressively has sought changes in those standards.

The ABA, a national professional organization of attorneys

whose membership is open to members of any bar in the United States, has been concerned with legal education and bar admissions throughout its history. In 1921, through its Section of Legal Education and Admissions to the Bar (the "Section"), the ABA first developed standards of accreditation for legal education programs. The ABA petitioned state supreme courts to rely on its accreditation decisions in connection with bar admission decisions. Now, all 50 states and the District of Columbia consider graduation from an ABA-accredited law school sufficient for the legal education requirement of bar admission. App. at 1396-1409. The United States Secretary of Education considers the Council of the Section to be the national agency for accreditation of professional schools of law and a reliable authority concerning the quality of legal education. App. at 3378. The ABA informs the states of its accreditation decisions and annually sends them the *Review of Legal Education in the United States*, the ABA accreditation standards, and any proposed revisions of the standards. During the period at issue, there were 177 ABA-accredited law schools in the United States and over 50 unaccredited schools with some form of state approval such as MSL enjoys. The ABA consistently has opposed attempts to change or waive bar admission rules to allow graduates of schools not accredited by the ABA to take the bar examination. *See, e.g.*, app. at 3623-53.

Many states have methods of satisfying the legal education requirement other than graduation from an ABA-accredited school. These methods include legal apprenticeship, practice in another state, and graduation from a school approved by the American Association of Law Schools ("AALS") or a state agency. The AALS is an association of 160 law schools

which serves as a learned society for law schools and legal faculty and as a representative of the law school community with the federal government and other education organizations. Furthermore, in every state, a bar applicant or law school can petition the bar admission authority for revision or waiver of the rules. MSL won a waiver of New Hampshire's rules to allow its graduates to take the bar in 1995, and has filed petitions seeking similar relief in Connecticut, Maine, New York, and Rhode Island. Maryland and Washington, D.C. have granted petitions of graduates of MSL to take the bar. MSL graduates can take the bar examination immediately after graduation in California, Massachusetts, New Hampshire, Vermont and West Virginia, and in 12 other states after practicing in another state first.

The ABA allows graduates of non-accredited schools to join the ABA once they are admitted to a bar and does not prohibit its members from hiring or otherwise dealing with graduates of such schools. The ABA does not prevent its members from teaching at non-ABA-accredited schools, but it does not allow its accredited schools to let students transfer credits from unaccredited schools or to accept graduates of unaccredited schools into graduate programs.

ABA accreditation is open to any law school that applies and meets the ABA standards. The ABA grants provisional accreditation to schools that substantially comply with its standards and promise to comply fully within three years. An Accreditation Committee makes an initial evaluation of a school for provisional accreditation and gives a recommendation to the Council of the Section. The Council then makes a recommendation to the ABA House of

Delegates, which has the ultimate decision-making authority.

A law school must have been teaching students for five years and graduated three classes to be eligible for AALS membership. The AALS holds an annual meeting, professional conferences and workshops,[1] and publishes the *Journal of Legal Education*. All of its current members are ABA-accredited, but accreditation is neither necessary nor sufficient for membership approval. The AALS accredits schools in the sense that it determines whether a school meets its membership requirements, but it has accreditation standards and procedures separate from those of the ABA. The AALS conducts a site visit, independently of the ABA, when a school applies for membership, and it conducts periodic visits after membership, usually jointly with the ABA if the school is ABA-accredited. The AALS is not involved with site inspections for provisional ABA accreditation, such as the one the ABA undertook at MSL.

The Law School Admissions Council, Inc. ("LSAC") is the successor organization to the Law School Admission Council and Law School Admission Services, Inc. The LSAC, as have its predecessors, administers the Law School Admissions Test ("LSAT"). The LSAC is not affiliated formally with either the ABA or the AALS and does not participate in the ABA accreditation process. Membership in the LSAC is open to any United States law school that (1) requires that

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[1] The AALS does not prohibit non-members from attending these conferences, and representatives of MSL have attended them, even though MSL is not a member and never has applied for membership. App. at 2279-80.

"substantially all of its applicants for admission take the Law School Admission Test," and (2) is ABA-accredited or an AALS member. App. at 2552. MSL does not require the LSAT, never has applied for AALS membership, and is not ABA-accredited, so thus is not eligible for LSAC membership.

In addition to administering the LSAT, the LSAC performs a number of other services. The Candidate Referral Service ("CRS") provides lists of names and addresses of people who have taken the LSAT. Use of the CRS is open to any school which has degree granting authority from a state, regardless of LSAC membership or ABA accreditation, and MSL has made use of this service. App. at 2410-12, 2511-12, 2427-29. The Law School Data Assembly Service ("LSDAS") provides a summary of a law school applicant's college record and LSAT score. LSDAS is also open to all schools and has been used by MSL. App. at 2410-12. The LSAC publishes a handbook, *The Official Guide to U.S. Law Schools*, with a two-page description of each United States LSAC member school, and two appendices with the names and addresses of Canadian LSAC members and unaccredited United States law schools, including MSL, known to the LSAC. The LSAC also sponsors regional recruiting forums for law school applicants and conferences of pre-law advisors which are only open to LSAC members.

B. *The Complaint*

MSL applied for provisional ABA accreditation during the fall of 1992 and early 1993. MSL never claimed it was or would be in compliance with ABA standards, but instead asked for a waiver under Standard 802 which allows the

Council to grant variances from the standards. Following the established process, a seven-member site evaluation team appointed by and representing only the ABA visited MSL and then prepared a 76-page report which was sent to MSL. MSL sent a 90-page response to the site team report.

The Accreditation Committee, after reviewing the site report and the MSL materials, and hearing a presentation from six MSL representatives, recommended denial of MSL's accreditation application because it did not meet the ABA requirements. The Committee also recommended denial of the waiver request. In a letter to MSL explaining its denial recommendation, the Committee listed 11 areas where MSL failed to comply with ABA standards. App. at 837-48. These areas included the high student/faculty ratio, over reliance on part-time faculty, the heavy teaching load of full-time faculty, the lack of adequate sabbaticals for faculty, the use of a for-credit bar review class, the failure to limit the hours students may be employed, and the failure to use the LSAT or give evidence validating its own admission test.[2] App. at 845-46. The body of the letter discussed the inadequacy of MSL's law library, but the letter did not cite that inadequacy as one of the reasons for the denial recommendation. App. at 842-43; *see* app. at 845-46. The letter did not discuss the salaries of MSL's faculty. Invoking ABA procedures, MSL appealed but, after a full review at which MSL had the opportunity to make a presentation, the denial of accreditation was upheld on February 8, 1994.

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[2] MSL challenged all these standards, as well as standards on faculty salaries and law libraries, in its antitrust complaint.

MSL filed this action on November 23, 1993, alleging that the ABA, AALS, LSAC, and 22 individuals combined and conspired to organize and enforce a group boycott in violation of section 1 of the Sherman Act and conspired to monopolize legal education, law school accreditation, and the licensing of lawyers, in violation of section 2 of the Sherman Act. 15 U.S.C. §§ 1-2. The complaint basically alleged that the appellees conspired to enforce the ABA's anticompetitive accreditation standards by: (1) fixing the price of faculty salaries; (2) requiring reduced teaching hours and non-teaching duties; (3) requiring paid sabbaticals; (4) forcing the hiring of more professors in order to lower student/faculty ratios; (5) limiting the use of adjunct professors; (6) prohibiting the use of required or for-credit bar review courses; (7) forcing schools to limit the number of hours students could work; (8) prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs; (9) requiring more expensive and elaborate physical and library facilities; and (10) requiring schools to use the LSAT.[3] MSL alleged that enforcement of these anticompetitive criteria led to the denial of its application for provisional accreditation and caused MSL to suffer a "loss of prestige" and direct economic damage in the form of declining enrollments[4] and tuition revenue.

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[3] MSL alleges that a self-interested cabal of legal educators who enforce the allegedly anti-competitive criteria to their own advantage has "captured" the ABA accreditation process.

[4] MSL says that its entering classes are now only 40% of what they were before the denial of accreditation. MSL br. at 4.

After MSL filed its complaint, the Antitrust Division of the United States Department of Justice ("DOJ") began an investigation of the ABA's accreditation process and on June 27, 1995, filed suit against the ABA in the United States District Court for the District of Columbia alleging violations of section 1 of the Sherman Act. The ABA entered into a consent decree with the DOJ on June 25, 1996, settling that case.

After a period of discovery under Rule of Reason standards, the district court granted the appellees summary judgment on both counts. The court held MSL did not suffer a cognizable antitrust injury; any disadvantage it incurred was attributable to the decision by the individual states to preclude graduates of unaccredited schools from taking bar examinations, and such injury "cannot be the basis for antitrust liability" under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961). *Massachusetts School of Law v. American Bar Ass'n*, 937 F.Supp. 435, 441 (E.D. Pa. 1996). The court also held that to the extent that the unaccredited status creates a stigma which injures MSL, *Noerr* precludes recovery for the injury because it is "incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations." *Id.* at 442. In the alternative, the court held that even if the stigmatic injury were not incidental to *Noerr*-protected conduct, the claim still would fail because the ABA has done nothing more than express its opinion, which is speech protected by the First Amendment, and not conduct for which there can be antitrust liability. *Id.* at 442-46.

MSL appeals from the order for summary judgment and a number of prior orders related to discovery, the dismissal of the individual appellees for lack of personal jurisdiction, the denial of a motion to recuse Judge Ditter, and the disqualification of MSL's inside counsel. The DOJ has filed an amicus brief arguing that the district court erred in holding that any stigmatic injury from non-accredited status was incidental to a *Noerr*-protected injury to the extent that there was no actual petitioning of government in this case. The DOJ also argues that the district court erred in holding that the First Amendment immunizes anticompetitive effects brought about through speech.

II. DISCUSSION

A. *Standard of Review*

We review a district court order granting summary judgment de novo both as to factual and legal questions. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 632 (3d Cir. 1996); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). We review discovery orders under an abuse of discretion standard. *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 90 (3d Cir. 1987); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir. 1983). As germane here, MSL has to show that the district court's denial of discovery "made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982) (citation omitted). We review the district court's denial of the motion for recusal for abuse of discretion. *Blanche Road Corp. v.*

Bensalem Township, 57 F.3d 253, 265 (3d Cir.), *cert. denied*, 116 S.Ct. 303 (1995); *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995).

B. *Discovery Issues*

1. Price Fixing

MSL argues that a district court order of May 20, 1994, which held that the ABA standards were not price fixing and *per se* unlawful and that discovery would proceed under a Rule of Reason analysis, *MSL*, 853 F.Supp. 837 (E.D. Pa. 1994), is contrary to law and should be reversed. MSL contends that the district court held in this order that "the ABA had *not* fixed prices," and that that holding is contrary to settled law. MSL br. at 40. This argument mischaracterizes the district court's holding. As the district court correctly noted, ABA Standard 405(a) (considering faculty salaries as part of school's ability to attract and retain quality faculty) is somewhat vague. Although not dispositive, the lack of a specific price floor or ceiling suggests that the standard represents something other than a classic price-fixing arrangement. *MSL*, 853 F.Supp. at 840. The court, however, did say that the standard was "price-affecting," which in many cases is sufficient for a *per se* approach. *Id. See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-24, 60 S.Ct. 811 (1940).

The court properly then went on to consider the context of the case. In this regard, it is significant that the ABA is a professional society and the Supreme Court has indicated that it has "been slow to condemn rules adopted by professional

societies as unreasonable *per se*," even when the behavior resembles conduct usually subject to a *per se* approach. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 2018 (1986) (Rule of Reason approach even though behavior resembled group boycott); *see also National Soc'y of Prof. Eng. v. United States*, 435 U.S. 679, 692- 94, 98 S.Ct. 1355, 1365-66 (1978) (using Rule of Reason analysis even though agreement affected prices); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n. 17, 95 S.Ct. 2004, 2013 n. 17 (1975) (distinguishing between practice of professions and other business activities); *United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993) (Rule of Reason approach used even though behavior resembled price fixing).

MSL nevertheless argues that the price fixing aspect of the ABA standards has infected the entire conspiracy, justifying a *per se* approach, and that the Supreme Court has discouraged finding new exceptions to the *per se* standard. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428-31, 110 S.Ct. 768, 778-79 (1990). We, however, do not apply a new exception to the *per se* approach here. Rather, the use of the Rule of Reason is appropriate here because where "a conspiracy of this sort is alleged in the context of a profession, the nature and extent of [the] anticompetitive effect are too uncertain to be amenable to *per se* treatment." *Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983).

MSL also appeals the district court's July 20, 1994 discovery order which held that MSL had not been injured by the alleged price fixing, and therefore denied discovery as to the faculty salary standard except insofar as it related to MSL's accreditation application. *MSL*, 857 F.Supp. 455 (E.D. Pa.

1994). Contrary to MSL's argument, this order did not hold as a final matter that the alleged salary fixing had no impact on MSL. It merely stated that "the evidence presently at hand does not support MSL's contention that one of the reasons the ABA declined to accredit MSL was noncompliance with the salary standard[ ]." *Id.* at 458. The court allowed MSL to continue discovery to ascertain whether salary was a factor in accreditation denial, but barred broader discovery as to the development and implementation of that standard.

MSL did find evidence that the ABA had data on its salaries (collected as part of general fact-finding about the school) and evidence that the ABA had warned other schools about low salaries. Nevertheless, MSL is not able to point to any evidence, or draw a reasonable inference, that the ABA actually used salary as a factor in denying MSL's accreditation or that the ABA's stated reasons for denying it accreditation were pretextual. In fact, the evidence and inferences point the other way, demonstrating that the ABA explicitly states low salaries as a factor when it is one. Thus, we cannot find that the district court's limitation of discovery in this manner was an abuse of discretion.

2. Conspiracy

MSL argues that the district court denied it the discovery necessary to prove its allegations of conspiracy. MSL complains generally about the lack of usefulness of the materials it did receive during discovery, but largely confines its argument to the materials the ABA turned over to the DOJ, some 544,000 pages. MSL cites a number of cases, including *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers*,

Inc., 87 F.R.D. 53 (E.D. Pa. 1980), for the proposition that civil antitrust plaintiffs can obtain discovery of documents produced for government antitrust cases. Br. at 37. In these cases, however, the government case had begun before the civil case, and the civil plaintiffs sought copies of the material given to the government at the outset of discovery in their cases. *See Golden Quality*, 87 F.R.D. at 59.[5]

In the present case, the government's investigation began after MSL's, and MSL sought all of the documents given to the government after the court set the confines of discovery in MSL's case. Thus, the district court held in an order dated August 6, 1996, that a request for all documents given to the government was an attempt "to do an end run around" the existing discovery framework. The court found that MSL could have obtained all those documents which were relevant through the existing discovery framework. *See Board of Educ. of Evanston Township v. Admiral Heating and Ventilation, Inc.*, 513 F.Supp. 600, 603-04 (N.D. Ill. 1981) (denying complete turnover of all materials collected by grand jury investigation). Given the context of this case, the court did not abuse its discretion in this ruling.

MSL also argues that it was not given sufficient opportunity to conduct discovery to withstand the appellees' summary judgment motion. MSL cites several cases for the proposition

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[5] Further, these cases involved requests to stay the civil proceedings until the completion of the government investigation. *See, e.g., Golden Quality*, 87 F.R.D. at 55. Of course, we recognize that the government's case against the ABA was civil but we are using civil to mean a non-governmental case.

that granting summary judgment before the opposing party has had sufficient opportunity for discovery can be reversible error. *See, e.g., Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986); *Mannington Mills, Inc. v. Congoleum Indus., Inc.*, 610 F.2d 1059, 1073 (3d Cir. 1979). Br. at 4. These cases are in tension with another line of cases which encourages the use of summary judgment in order to avoid burdensome litigation expenses when the allegations are theoretical or speculative. *See, e.g., Pennsylvania ex. rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984). While the present case fits neither paradigm exactly, the district court, by allowing fairly extensive discovery and then closing discovery and entertaining the summary judgment motion, did not abuse its discretion.

C. *Summary Judgment*

MSL asserts three types of injury resulting from the ABA's allegedly anticompetitive conduct. The first is that MSL is at a competitive disadvantage in recruiting students because graduates of unaccredited schools cannot take the bar examination in most states. Second, MSL says that denial of accreditation creates a stigma, independent of the bar examination issue. Finally, MSL contends that the ABA's enforcement of its accreditation standards injures it directly by increasing the cost of faculty salaries and creating a boycott of unaccredited schools.

In granting summary judgment to the appellees, the district court held that they were not subject to antitrust liability for

MSL's principal alleged injury, a competitive disadvantage in recruiting students, to the extent that the decisions of the individual states to prohibit graduates of unaccredited schools from taking their bar examinations caused the injury. *MSL*, 937 F.Supp. at 441. The court based this holding on the principles of *Noerr*, 365 U.S. 127, 81 S.Ct. 523. MSL argues on appeal that the *Noerr* principles do not apply here because private anti-competitive conduct is immunized only where it is (1) clearly and affirmatively authorized by state policy, and (2) actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943 (1980). *See also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169 (1992); *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988). The DOJ, in its amicus brief, does not challenge this aspect of the district court's holding.

In *Parker v. Brown* the Supreme Court held that the Sherman Act does not prohibit an anticompetitive restraint imposed by a state as an act of government. 317 U.S. 341, 352, 63 S.Ct. 307, 314 (1943). The decision in *Noerr* reaffirmed the *Parker* doctrine in stating "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." 365 U.S. at 136, 81 S.Ct. at 529. *Noerr* went on to hold that any attempt to petition or influence the government to impose an anticompetitive restraint is immune from antitrust action.[6] *Id.*

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[6] *Noerr* dealt specifically with legislative lobbying, but its principles were applied to cover attempts to influence the executive and judicial branches in *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct.

Further, even if the anticompetitive restraint results directly from private action, it is still immune if it is an "incidental effect" of a legitimate attempt to influence governmental action. *Id.* at 143-44, 81 S.Ct. at 533. As the Supreme Court put it, "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383, 111 S.Ct. 1344, 1355 (1991). Thus, the initial substantive issues on this appeal are whether state or private conduct caused the injury MSL alleges it suffered because its graduates could not take the bar examination in most states, and whether, if MSL suffered an injury as a result of the ABA's conduct, the injury was an incidental effect of the ABA's attempt to influence the states with respect to establishing criteria for bar admission. We will discuss each alleged injury separately.

1. Injury from bar examination requirements

Each state retains the authority to decide what applicants may take its bar examination and may be admitted to the bar.[7]

1585 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972).

[7] *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569, 104 S.Ct. 1989, 1996 (1984) ("Pursuant to the State Constitution the Arizona Supreme Court has plenary authority to determine admissions to the bar."); *In re Murphy*, 393 A.2d 369, 371 (1978) (bar admission "exercised [ ] exclusively by the Supreme Court"); *In re Hansen*, 275 N.W.2d 790, 796 (Minn. 1978) ("We have not delegated our authority to the ABA but,

Accordingly, MSL's argument that the ABA received "carte-blanche delegated authority to decide who can take bar exams," MSL reply br. at 19, is simply wrong. *See* cases cited *supra* note 7. Many, but not all, states consider the accreditation decisions of the ABA in their legal education requirement (one of many requirements) for taking the bar examination. Yet, every state retains the final authority to set all the bar admission rules, and individual applicants or law schools can petition the states for waivers or changes.

To the extent that MSL's alleged injury arises from the inability of its graduates to take the bar examination in most states, the injury is the result of state action and thus is immune from antitrust action under the doctrine of *Parker v. Brown*, 317 U.S. at 352, 63 S.Ct. at 314. The ABA does not decide who can take the bar examinations. Rather, it makes an accreditation decision which it conveys to the states, but the states make the decisions as to bar admissions. Without state action, the ABA's accreditation decisions would not affect state bar admissions requirements. Because the states are sovereign in imposing the bar admission requirements, the clear articulation and active supervision requirements urged by MSL are inapplicable. *See Quinn v. Kent Gen. Hosp., Inc.*, 617 F.Supp. 1226, 1240 (D. Del. 1985). In short, this case

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instead, have simply made a rational decision to follow the standards of educational excellence it has developed."); *Potter v. New Jersey Supreme Court*, 403 F.Supp. 1036, 1040 (D.N.J. 1975) (State's adoption of "the standards of an approving body does not support a conclusion that such adoption is an abrogation or delegation of the power or duty to supervise the practice of law in this State pursuant to the mandate of the State Constitution."), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

does not involve a delegation of state authority. To the contrary, the states use the ABA to assist them in their decision-making processes. Thus, we have here a government action case.

Our holding is consistent with current antitrust jurisprudence. The Supreme Court held in a challenge to Arizona's bar admissions policies that the conduct in question "was in reality that of the Arizona Supreme Court," and thus immune under *Parker*. *Hoover v. Ronwin*, 466 U.S. 558, 573-74, 104 S.Ct. 1989, 1998 (1984). Further, the Supreme Court has held that when a state supreme court adopts a state bar rule banning legal advertising, and retains final enforcement authority over it, *Parker* immunity applies. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697 (1977) ("The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process."). This case is entirely analogous. The states do not adopt the ABA's accreditation processes, but they do adopt and give effect to the results.[8] Thus, the cases cited by MSL (*Midcal*, *Patrick*, and *Ticor*) are inapplicable because they dealt with situations where private parties were engaging in conduct, whether price-fixing (*Midcal* and *Ticor*) or denying hospital privileges (*Patrick*), which led directly to the alleged antitrust injury. Here, the

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[8] The Supreme Court opinion in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988), is also consistent with our holding because it specifically excluded from consideration any injury resulting from the adoption of the challenged standards by any government and dealt only with the independent marketplace effect of the defendant's conduct. *Id.* at 500, 108 S.Ct. at 1937.

state action setting the bar examination requirements led to the alleged injury.[9]

Our holding is also consistent with several court of appeals and district court decisions applying the principles of *Noerr*. In *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit held under *Noerr* that the ABA could not be held liable for any antitrust injury resulting from the Illinois Supreme Court's adoption of ethical standards developed and promulgated by the ABA. *Id.* at 1383. Similarly, in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit held that a defendant which convinced a private association to produce a code that was adopted by or relied upon by a number of municipalities, and that injured the plaintiff, was immune from antitrust liability because the "injuries for which [plaintiff] seeks recovery flowed directly from government action."[10] *Id.* at 299. These cases cannot be distinguished effectively from this case.

In another analogous case, an organization that accredited chiropractic schools was held immune from Sherman Act liability for denying a school's accreditation because of a dispute over educational philosophy, when the alleged injury

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[9] In its reply brief, MSL continues to miss the crucial point that it is the direct action of the states which causes its injury and continues to discuss cases where private conduct caused the alleged antitrust injury. MSL reply br. at 11-15.

[10] In *Sessions*, the injury resulted from the denial of permits, while here the injury is from the prohibition precluding applicants from taking bar examinations in many states.

resulted from state decisions to deny licenses to graduates of unaccredited schools and from the effects of lobbying in favor of those state decisions. *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F.Supp. 716, 722-23 (N.D. Ga.1986), *aff'd*, 813 F.2d 349 (11th Cir. 1987). *See also Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96 (E.D. Va. 1989) (dismissing suit by students at unaccredited law school because of *Noerr* immunity). In these circumstances, MSL's claim that the ABA's conduct injured it because its graduates cannot take the bar examination in most states fails.

2. Stigma injury

MSL also alleges that independent of any bar examination requirements, it was injured by the stigmatic effect in the market place of the denial of accreditation. MSL claims that the ABA has conducted a campaign to convey the idea that ABA accreditation is the *sine qua non* of quality and that the ABA is the most, or only, competent organization to judge law schools. There is enough evidence to create a genuine dispute of material fact on this issue. *See* app. at 2105-09, 3570-72. Nevertheless, the district court ruled that this injury could not form the basis for antitrust liability because it was "incidental to the primary, protected injury," and thus immune under *Noerr*. *MSL*, 937 F.Supp. at 442. MSL challenges this holding on the grounds that there was no petitioning of government here, and therefore *Noerr* does not apply. The DOJ as amicus challenges the holding to the extent it finds petitioning unnecessary for immunity for stigma injury, but takes no position on whether any petitioning took place. We hold that there was sufficient petitioning to invoke *Noerr*

immunity.[11]

MSL relies extensively on the Supreme Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931 (1988).[12] In *Allied Tube*, a producer of electrical conduit sought approval of its product from the National Fire Protection Association for inclusion of the product in the Association's National Electrical Code. A substantial number of state and local governments adopted the code virtually without change. To be included in the code, all that was required was a majority vote of the members present at the annual meeting of the Association. To prevent approval of the electrical conduit at question in the case, competitors of the producer stacked the annual meeting with persons who pledged to vote against approval. On the facts in *Allied Tube* the Court held that the code developed by the defendants had a force in the marketplace independent of any government adoption (or petitioning for such adoption) in that there was

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[11] In its reply brief, MSL seriously misstates the *Noerr* doctrine, arguing that only "successful petitioning of courts to clearly and affirmatively authorize ... closely supervise, review and approve" the ABA's conduct would provide immunity. MSL reply br. at 19. Under *Noerr*, any solicitation of government action is immune, whether or not it is successful. This mischaracterization stems from MSL's continued inability to recognize that there is state action at issue here, not private conduct.

[12] MSL's additional reliance on *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935 (1982), is misplaced because that case dealt with agency and apparent authority issues and does not consider *Parker* or *Noerr* immunity. It also dealt with an attempt to interfere directly with a company's customers, 456 U.S. at 562, 102 S.Ct. at 1940, an exception to *Noerr* inapplicable here.

a conspiracy among manufacturers, distributors, and consumers not to trade in products not approved by the code. 486 U.S. at 503, 507, 108 S.Ct. at 1938-40. Further, the Court held that the application of *Noerr* immunity depends "on the context and nature of the ... activity," and found the challenged conduct to be "the type of commercial activity that has traditionally had its validity determined by the antitrust laws." 486 U.S. at 504-05, 108 S.Ct. at 1939. That was so, the Court reasoned, because the activity of which the producer complained involved the dubious commercial practices of economically interested actors that had an impact on the political process; it was not political activity that had an impact on commerce.

The conduct of which MSL complains here is basically the ABA's justification of its accreditation decisions and MSL is asserting a loss of prestige resulting from it. This conduct is neither normal commercial activity nor the type of restraint of trade involved in *Allied Tube*, and thus that case is not controlling. A loss of prestige resulting from a refusal to approve a product or service does not alone make out an antitrust claim. *See Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988).

Noerr immunity is proper in this case because the ABA engaged in petitioning activity, and the stigma injury which MSL suffered was incidental to that activity.[13] MSL admits

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[13] There is no "conspiracy" exception to either *Noerr* or *Parker* immunity. *Omni*, 499 U.S. at 383, 111 S.Ct. at 1355.

that in the past, "from the 1920's to approximately the mid 1970's," the ABA petitioned the states in a campaign to prohibit graduates from unaccredited schools from taking bar examinations. *See* MSL br. at 16. This campaign was obviously successful as now most states require graduation from an ABA-accredited school for admission to the bar. The ABA's current conduct surely would be considered petitioning if it took place during the past campaign. The fact that the ABA was successful in lobbying the states does not weaken its position. The ABA continues to communicate its accreditation decisions to the states, and it desires that they continue to give them credence. Discussing the quality and competence of its decisions is a legitimate, although somewhat indirect, way of petitioning the states to continue to follow its guidance. Yet, such activity is no more indirect than the public relations campaign held to be petitioning in *Noerr*. 365 U.S. at 140-41, 81 S.Ct. at 531.

There is an exception to *Noerr* immunity that would apply if the ABA "attempted directly to persuade anyone not to deal with" MSL. *See Noerr*, 365 U.S. at 142, 81 S.Ct. at 532. There is no evidence that the ABA made such an attempt (there was such evidence in *Allied Tube*), nor is there any other evidence suggesting that *Noerr* immunity should not apply here. In a supplemental filing of information after oral argument, MSL produced two instances where it claims the ABA directly mentioned MSL. The first is a *Boston Globe* article about the denial of accreditation to MSL in which an ABA governor defended the ABA standards as providing "a minimum level of quality and consumer protection assurance to the public." John H. Kennedy, "Andover Law School Loses Appeal for Accreditation," *Boston Globe*, February 9,

1994, at 42. The second proffered piece of evidence is a transcript of the ABA House of Delegates debate of MSL's accreditation application, where one member urged the denial of MSL's application and stated that the standards with which MSL did not comply "lie at the heart of a quality institution."

Both of these statements do nothing more than defend the ABA standards. As we discuss above, this is valid, if indirect, petitioning activity. The ABA is not saying directly that MSL is a bad institution, or that a particular student should not go there. MSL's attempts to characterize all the ABA's comments about the quality of its accreditation process as direct attacks on MSL does not make them direct attacks. We also point out that if a claim for stigma injury could be advanced in circumstances like those here, *Noerr* immunity would be confined severely; a petitioner for governmental action is likely to urge that the action is needed to ensure that standards are met, thereby suggesting that some entities do not meet appropriate standards.

3. Direct injury from ABA standards

MSL alleges a third injury which occurs directly from the ABA's enforcement of its standards, independent of both the bar examination and stigma issues. The challenged standards relate to faculty salaries (MSL charges price-fixing) and limitations on accredited schools accepting transfers or graduate students from unaccredited schools (MSL charges a boycott). Although the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school and from any stigma injury resulting from the

denial of accreditation under the *Noerr* petitioning doctrine, the ABA is not immune in the actual enforcement of its standards. The state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. *See Midcal*, 445 U.S. 97, 100 S.Ct. 937. Thus, the ABA's enforcement of an anticompetitive standard which injures MSL would not be immune from possible antitrust liability. Extending *Noerr* immunity to this type of private activity would run counter to *Allied Tube*.

We start our analysis of this direct injury issue by pointing out that "to survive [ ] motion for summary judgment, [the plaintiff] must establish that there is a genuine issue of material fact as to whether [the defendants] entered into an illegal conspiracy that caused [the plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355 (1986). The district court held that MSL did not raise a genuine issue of fact as to whether it was injured by the salary, transfer or graduate student standards. *MSL*, 937 F.Supp. at 441 n.10, 445 n.20.

As we discuss above, MSL failed to show sufficient evidence that it was denied accreditation because it did not comply with the salary standard. Therefore, MSL has to show that the ABA's alleged fixing of salaries at its accredited schools somehow injured it in another way. At first glance, the argument that the ABA's faculty salary standards injured MSL makes no economic sense. As the district court commented, if ABA-accredited schools are required to pay

higher salaries, an unaccredited school should have a cost advantage. *See MSL*, 937 F.Supp. at 441 n.10. Indeed, it would appear that a conspiracy to increase the conspirators' costs would be no more logical than would a conspiracy to reduce the conspirators' income. *Cf. Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1195-1204 (3d Cir. 1995) (discussing predatory pricing monopoly case). Thus, while we consider this appeal on ordinary summary judgment standards, we point out that it could be argued that MSL "must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356.

MSL alleges that the faculty salary standards injured it in two ways. First, MSL asserts that it raised its salaries in an attempt to get accreditation. This claim is in direct conflict to its consistent assertion that it refused to comply with the ABA's anticompetitive standards and for that reason was denied accreditation. *See, e.g.*, MSL br. at 3-4. The claim also is remarkable because MSL made it clear that it would not comply with ABA standards to obtain certification. Further, MSL's assistant dean testified that MSL salaries have "never been tied to" ABA standards.[14] App. at 439. Rather, its dean stated that the salary increases were made out of fairness and as a reward for hard work. App. at 393. The only other related evidence shows that MSL acted independently to increase its salaries, and then later found that this action might help it get accreditation. *See* app. at 828.

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[14] MSL points out that the assistant dean has no role in setting MSL's salaries, so he is only giving his personal belief on the issue. MSL reply br. at 30, sup. app. at 5476-79.

Unsupported allegations to the contrary, *see* app. at 2123, are not sufficient without explanation to outweigh the prior testimony and avoid summary judgment. *See Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *but see Videon Chevrolet, Inc. v. General Motors Corp.*, 992 F.2d 482, 488 (3d Cir. 1993) (distinguishing *Martin* and holding that statements have to be clearly contradictory and without explanation to be insufficient to defeat summary judgment motion). There has not been sufficient explanation of the contradiction to create a genuine issue of material fact and justify reversing the summary judgment.

MSL's second contention that the ABA's salary standards injured it is that the standards inflated the market cost of law professors, thereby increasing the salaries MSL must pay its faculty. This market price argument is equally unavailing. MSL's stated policy was to rely on adjunct faculty. MSL did not produce evidence that any of its faculty other than its dean ever had been employed at another law school. In effect, MSL was hiring faculty from a different market, one unaffected by the ABA's conduct, or at least a different provider in the same market (teachers who never taught at ABA-accredited schools). The report by MSL's economic expert does not contradict this point, app. at 3568, because it contains only general and theoretical observations and is not tied to evidence in the record.[15] Thus, we can disregard it for

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[15] "[A]s I understand it, MSL was forced to raise its salaries to levels above what it would have otherwise (a) in an attempt to satisfy the standards and (b) because of the market effects of the standards on prices in the input markets. The anticompetitive effects of those practices affect

the purposes of reviewing the summary judgment. *See Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984). Our result is supported by MSL's policy towards salaries: "because a professor at MSL must prove himself or herself as a full-time faculty member before obtaining a large salary, MSL retained a level of starting salaries that are below ABA requirements." App. at 2123.[16]

The situation here is analogous to that in *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). In that case we held that a purchaser from competitors of a price-fixer did not have standing to sue the price-fixer on the grounds that the general market price increased as a result of the price fixing. *Id.* at 587. We explained *Mid-West Paper* in *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1167-68 (3d Cir. 1993), where we focused on how direct an impact the challenged conduct had on the plaintiff. MSL was not impacted directly by the ABA's criteria because it was hiring a different kind of professor. *Mid-West Paper*

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input prices (salaries, etc.) for MSL, as well for every other law school. The practices injure all of the schools that have accepted the standards, as well as those that have not. Because the standards have an undeniable impact on input costs, every school is forced to incur higher costs, along with the reduction in the flexibility needed to respond efficiently to changing conditions, all schools suffer competitive injury as well." App. at 3568.

[16] It is interesting to note that MSL charges that the ABA and the AALS engaged in a conspiracy to restrain trade. It thus appears that insofar as the salary standards are concerned, MSL believes that the AALS conspired to increase its member law schools' costs.

thus controls, and summary judgment was proper.[17]

MSL also alleges a boycott in that the ABA prevented its accredited schools from accepting transfers or graduate students from unaccredited schools. The district court held that MSL had not produced any evidence that it was injured by either of these rules. *MSL*, 937 F.Supp. at 445 n.20. This holding is correct. MSL has done nothing more than state the standards and allege that they injured MSL. *See* app. at 2108, 2120. There is no factual support for these allegations. Further, the evidence shows that MSL actively opposed its students transferring, both in policy and practice.[18] MSL therefore cannot claim that the ABA's prohibition on transfers with credit injured it.[19]

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[17] This is true even though *Mid-West Paper* dealt with standing and we deal here with whether there is a genuine issue of fact as to MSL's injury, for the concepts are similar.

[18] Its dean testified in another proceeding "MSL would have [ ] denied admission had it known [a student] intended to seek transfer away as soon as possible." App. at 1415. MSL considered transfers to be "extremely harmful to the school," *Id.* at 1416, and that assisting students in transferring was "self-destructive." *Id.* at 1231.

[19] MSL's reliance on the allegations in the government's antitrust case which we described above is unavailing for two reasons. First, those allegations never were proven because the case was settled, and therefore cannot be taken as true in this case. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995); *Petruzzi's IGA v. Darling-Delaware*, 998 F.2d at 1247. Second, the government never alleged that MSL suffered any injury from these standards and does not so argue in its amicus brief in this case. *See, e.g.*, DOJ br. at 6-7.

MSL also alleges that the AALS boycotted MSL by refusing membership and that the LSAC boycotted MSL by refusing to allow it to attend certain recruiting conferences. *See* MSL br. at 59. The allegations regarding the AALS are simply incorrect. AALS membership is independent of ABA accreditation, and MSL never has applied for such membership. App. at 2278-80. Even though it is not a member, MSL can attend AALS conferences and has done so. *Id.* at 2280. Therefore MSL has not suffered any injury at the hands of the AALS.

The LSAC's failure to invite MSL to its conferences does not constitute a boycott.[20] Under the fact-pattern here to demonstrate a boycott MSL, has to show that these conferences are an essential facility for recruiting students as there is no other potential basis for the boycott claim. Such an essential facility or claim fails whenever a plaintiff (1) cannot show that the defendant has a monopoly over the alleged essential facility; (2) the facility cannot be duplicated in a reasonable manner; and (3) the plaintiff has been denied its use. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996). MSL has shown only that the LSAC denies it participation. There is no evidence suggesting that the LSAC has a monopoly over access to law students or pre-law advisors, or even over recruiting fairs. The LSAC does not hinder MSL's recruiting in any way, it just does not aid it

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[20] LSAC conferences are only open to LSAC member schools. MSL is not a member of the LSAC because it does not use the LSAT and it is not accredited by either the ABA or the AALS.

by allowing MSL to attend its conferences.[21] Such activity is not required by the antitrust laws, and its absence does not constitute antitrust injury.

Further, MSL has not shown that the LSAC injured it. The LSAC never allowed MSL to attend its conferences and, prior to ABA accreditation denial, MSL's enrollment exceeded its projections. App. at 2420-24. It was the denial of accreditation which caused MSL's enrollment to decline, and as discussed above, in light of *Parker* and *Noerr* that loss cannot be the basis for antitrust liability. MSL contends that as long as it was injured in some way by the overall alleged conspiracy, it need not show injury from its individual aspects, and cites in this respect *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1172. Reply br. at 35. While this principle is correct, it is inapplicable here. *In re Lower Lake Erie* did not involve state action or petitioning of government immunity issues. Here, MSL must show that it was injured in some way by the ABA's enforcement of its standards, independent of any injury from the immune state action or petitioning, and as we discuss above, it has not done so.

Inasmuch as we hold that MSL has failed to demonstrate an injury for which antitrust liability may lie, we need go no further to affirm the district court's summary judgment order with respect to issues beyond those controlled by *Parker* and *Noerr*. Thus, we do not consider the district court's alternative free speech immunity theory. Further, we make no

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[21] Similarly, MSL's claims about getting only a listing in *The Official Guide to U.S. Law Schools* fail because there are many such publications, some of which do describe MSL.

comment on whether MSL produced sufficient evidence to show the existence of a conspiracy for two reasons.[22] First, the alleged conspiracy with respect to the injuries from the bar examination requirements and the stigma from denial of accreditation involved immunized conduct. *See Omni*, 499 U.S. at 381-84, 111 S.Ct. at 1354-56. Second, MSL did not demonstrate that it suffered injury from the conduct not immunized. 15 U.S.C. § 15; *see Matsushita*, 475 U.S. at 585-86, 106 S.Ct. at 1355; *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d at 641; *see also Sciambra v. Graham News*, 892 F.2d 411, 414-15 (5th Cir. 1990); *United States Football League v. National Football League*, 842 F.2d 1335, 1377-78 (2d Cir. 1988). Of course, we hasten to add that we do not hold that if MSL had been able to demonstrate injury from conduct beyond the scope of *Parker* and *Noerr* antitrust immunity there necessarily would be liability as we have no need to reach that point.

D. *Dismissal of the Individual Appellees*

The district court dismissed claims against the 22 individual appellees for lack of personal jurisdiction in the Eastern District of Pennsylvania in an order on March 11, 1994. *MSL*, 846 F.Supp. 374 (E.D. Pa. 1994). The court, upon reconsideration and after MSL had conducted some discovery, found on May 31, 1994, that MSL could not "suggest, much less show, substantial acts in Pennsylvania." *MSL*, 853 F.Supp. 843, 845 (E.D. Pa. 1994). MSL challenges the dismissal on the grounds that it was entered before MSL was allowed to

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[22] We do note, however, that there is no probative evidence that the AALS or LSAC was involved in any kind of conspiracy with the ABA.

undertake any discovery as to the appellees' contacts within the district.

Our rule is generally that jurisdictional discovery should be allowed unless the plaintiff's claim is "clearly frivolous." *Nehemiah v. The Athletics Congress*, 765 F.2d 42, 48 (3d Cir. 1985), *citing Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983). The district court found (at least by implication), and we agree, that MSL's jurisdictional claims were clearly frivolous. Our result is in accord with other cases which hold that a mere unsupported allegation that the defendant "transacts business" in an area is "clearly frivolous." *See Garshman v. Universal Resources Holding, Inc.*, 641 F.Supp. 1359, 1366 (D.N.J. 1986), *aff'd on other grounds*, 824 F.2d 223 (3d Cir. 1987);[23] *see also American Centennial Ins. Co. v. Handal*, 901 F.Supp. 892, 899 (D.N.J. 1995). MSL legitimately cannot allege a nationwide conspiracy and then say, without more evidence, that such a conspiracy must have effects in Pennsylvania.

Further, jurisdictional discovery generally relates to corporate defendants and the question of whether they are "doing business" in the state. *See Compagnie Des Bauxites*, 723 F.2d at 362 and cases cited therein. Where the defendant is an individual, the presumption in favor of discovery is reduced. *See Shaw v. Boyd*, 658 F.Supp. 89, 91 n.1 (E.D. Pa. 1987). Thus, the district court's order dismissing the individual appellees without ordering discovery first was

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[23] *Garshman* was decided on venue grounds, but the analysis is the same as for personal jurisdiction. *Garshman*, 641 F.Supp. at 1366.

correct.[24]

E. *Recusal of Judge Ditter*

MSL made several attempts to have Judge Ditter recused. Judge Ditter denied MSL's recusal motion in an opinion dated December 16, 1994. *Massachusetts School of Law v. American Bar Ass'n*, 872 F.Supp. 1346 (E.D. Pa. 1994). MSL's attempts to seek his recusal in this court were also unavailing (one denied, one held moot in light of this appeal). Inasmuch as we are affirming the summary judgment, we need not consider arguments regarding reassignment on remand. We review the denial of the recusal motion for abuse of discretion.

MSL argues that Judge Ditter has both the appearance of bias and actual bias, and should be removed from the case under either 28 U.S.C. § 455(a) or this court's authority as recognized in *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993), and *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992). The standard for recusal is whether an objective observer reasonably might question the judge's impartiality. MSL contends that both one past out-of-court experience, and the bias which it asserts is apparent from his rulings, justify Judge Ditter's recusal.

MSL argues that Judge Ditter's participation in 1974-75 on an outside committee which tried to help the Delaware Law School, where his son was then a student, obtain ABA

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[24] We note that in view of our merits disposition we can conceive of no way that the individual appellees could be liable in this case.

accreditation justifies recusal. In over 200 pages of documents submitted by MSL relating to Delaware Law School (gleaned from depositions and testimony before several courts), Judge Ditter's name appears only six times. This evidence suggests nothing more than that Judge Ditter had several meetings with the person who was the driving force behind the effort to make changes at Delaware Law School in order to qualify for accreditation. There is one affidavit from the former dean of that school that suggests that Judge Ditter played a more active role, but Judge Ditter, in his careful consideration of the recusal motion, sufficiently points out the inconsistencies between this declaration and other more contemporaneous testimony. *See MSL*, 872 F.Supp. 1346, 1358-65 (E.D. Pa. 1994). We thus affirm Judge Ditter's holding that nothing related to Delaware Law School creates an appearance of bias in this case. This is true both because of Judge Ditter's limited role at the time and the amount of time which has passed. This view is in accord with the prevailing case law. *See, e.g., In re Allied Signal, Inc.*, 891 F.2d 974, 976 (1st Cir. 1989) (upholding denial of recusal motion based on social and business relationship eight years earlier between judge and one of plaintiff's attorneys); *Alexander v. Chicago Park Dist.*, 773 F.2d 850, 857 (7th Cir. 1985) (denying recusal motion based on judge's representation of witness 25 years earlier).

Furthermore, we do not understand why Judge Ditter's participation in the Delaware Law School accreditation process, no matter how intensive, would cause an objective observer to believe that he would not be impartial here. The Delaware Law School and MSL situations, though somewhat similar in nature, are unrelated. Indeed, it is difficult even to

articulate a reasonable basis on which to argue that by reason of Judge Ditter's experiences regarding the Delaware Law School he would have a bias here. As far as we can see, there is no more basis to think that Judge Ditter was not impartial here because of his experiences 20 years ago with Delaware Law School, than to believe that a judge who had been in an automobile accident would not be impartial in a case involving a different accident.

MSL also argues that Judge Ditter's rulings, both in substance (allegedly always against MSL) and in form (allegedly repeatedly vilifying and condemning MSL and its dean), demonstrate actual bias. Since we have affirmed several of the rulings MSL contends demonstrate bias, and a review of the record shows that there was no pattern of consistently ruling against MSL, there is no actual bias.

We also point out that a judge's consistent pattern of ruling against a party could be entirely justified for that party might consistently be taking positions that cannot be supported. Even-handed justice does not require a judge to balance numerically the rulings in favor of and against each party. After all, each ruling stands on its own. Furthermore, the Supreme Court has said that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994).[25] We do not believe that a reasonable person who looked at Judge Ditter's rulings objectively would find the appearance of bias. *See United States v. Bertoli*, 40 F.3d

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[25] The holding in *Liteky* required bias to stem from an "extrajudicial source" to support a recusal under section 455(a).

1384, 1413 (3d Cir. 1994). It should be apparent to anyone that he worked diligently in this hard-fought case and, as far as we are concerned, reached the correct outcome.

We also do not find that any of Judge Ditter's comments cited by MSL, *see* MSL br. at 23-25, suggest the appearance of partiality. The *Liteky* Court held that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." 510 U.S. at 555, 114 S.Ct. at 1157, *see also In re Skobinsky*, 167 B.R. 45, 52 (E.D. Pa. 1994). MSL's desire to impute hostile intent to Judge Ditter does not mean he had that intent, and does not create an appearance of bias. MSL's attitude appears to be that anyone who disagrees with it is both wrong and biased, but the evidence does not show this. The cases cited by MSL are inapplicable because they dealt with unique extrajudicial contact with a party, *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992), an implicit admission of bias by the judge, *In re Antar*, 71 F.3d 97, 101 (3d Cir. 1995), or reassignment on remand, *Haines* and *Alexander*. Since this case will not be remanded, we need not consider reassignment and, as we discussed, Judge Ditter's denial of the recusal motion was not an abuse of discretion.

F. *Disqualification of Inside Counsel*

MSL also appeals the district court's disqualification of five members of MSL's administration and faculty from serving as

trial counsel, giving oral argument, and taking depositions.[26] Since MSL does not allege that it received incompetent counsel, and we are affirming the summary judgment order, the issue probably is moot. In any event, the court did not err in requiring the disqualification.

III. CONCLUSION

The order of the district court entered August 29, 1996, granting the appellees summary judgment and the other orders on appeal will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
For the Third Circuit

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[26] By agreement among the parties, this order later was modified to allow two of the MSL professors to act as trial counsel. MSL br. at 29 n. 12.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.

v.

AMERICAN BAR ASSOCIATION, et al.

Civil Action No. 93-6206.

Aug. 29, 1996.

OPINION AND ORDER

DITTER, *District Judge.*

I. INTRODUCTION

For many years, the American Bar Association has evaluated law schools using a set of standards it has developed for that purpose. The Massachusetts School of Law brought this antitrust action against the American Bar Association, the Law School Admission Council, Law School Admission Services,[27] and the Association of American Law Schools[28] after ABA

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[27] The LSAC and LSAS work together under the name LSAC/LSAS. In part, they sponsor, administer, and profit from the Law School Admission Test.

[28] The AALS is an association of law schools. Its membership includes many ABA-accreditated law schools and it participates in the ABA accreditation process.

denied it provisional accreditation. MSL alleges that the defendants violated the Sherman Act by restraining trade with anticompetitive policies[29] and conspiring to monopolize, and monopolizing the law school training field, the accreditation of law schools, and the licensing of lawyers.[30] It seeks treble damages, interest, and costs. It does not seek accreditation as part of this lawsuit.

MSL maintains that *some* of the standards that ABA uses to inform its accreditation decisions violate the Sherman Act. Plaintiff's restraint of trade claim rests on its contention that the ABA's adoption and approval of the standards have the purpose and effect of artificially enhancing faculty salaries, limiting the services of law school professors, imposing unnecessarily costly guidelines for law school libraries,

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[29] Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal.

15 U.S.C. § 1.

[30] Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.

15 U.S.C. § 2

increasing law school tuitions, and "freezing out of law school persons from lower socio-economic classes and persons in mid-life." Plaintiff's monopolization claim is based on its contention that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school training, accreditation, and licensing processes.

Before me is ABA's motion for summary judgment.[31] It contends that judgement should be entered in its favor for six independent reasons: (1) MSL's alleged injury stems exclusively from the bar admissions rules of the sovereign states, not the ABA standards; (2) MSL cannot demonstrate an injury to competition between or among law schools generally resulting from the ABA's decision not to accredit MSL; (3) MSL cannot demonstrate that the ABA standards that it is challenging were the cause-in-fact of its injuries; (4) the antitrust laws do not apply to the non-commercial aspects of higher education; (5) even examining the particular challenged standards under a rule of reason analysis, no triable issue exists and judgment is proper as a matter of law; and (6) the conspiracy alleged by plaintiff is illogical and makes no economic sense. For the reasons discussed below, I will grant ABA's motion.

II. STATEMENT OF FACTS

MSL is a Massachusetts corporation that has been operating a law school in Andover, Massachusetts, since 1988. In 1990, MSL was authorized by the board of regents

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[31] In addition to filing separate motions for summary judgment, LSAC/LSAS and AALS have joined ABA's motion.

of the Commonwealth of Massachusetts to award the degree of *juris doctor* to its graduates. That authority enables plaintiff's graduates to sit for several bar examinations, including Massachusetts'.

In the fall of 1992, MSL applied for ABA accreditation. Accreditation is a valuable credential for a law school because all 50 states and the District of Columbia permit graduates of ABA-accredited schools to sit for their bar examinations. The prerequisites for taking particular bar examinations and ultimate admission to the bar are established by the states, not the ABA or any of the other defendants. MSL has its own approach to legal education, an approach that often differs sharply from ABA's more traditional views. Although it acknowledged that as a matter of policy, many aspects of its program did not comply with the ABA standards that guide accreditation decisions, MSL requested a variance for each of the standards which it had refused to follow.[32]

Following its usual procedure when making accreditation decisions, ABA sent a site evaluation team to examine MSL's program. Based on that team's factual report about MSL and MSL's response, ABA denied MSL provisional accreditation. A series of appeals taken by MSL were fruitless.

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[32] ABA standard 802 provides that:

> A law school proposing to offer a program of legal education contrary to the terms of the Standards may apply to the Council for a variance. The variance may be granted if the Council finds that proposal is consistent with the general purposes of the Standards. The Council may impose such conditions or qualifications as it deems appropriate.

MSL maintains that its failure to secure ABA accreditation handicaps the school in competing for students because its graduates cannot take the bar examinations of 42 states, and the school has been generally stigmatized by the denial. (Compl. ¶¶ 18, 41; Velvel Dep., 8/25/94, at 30:1-15).

In summary, this case concerns the evaluation of educational philosophies, methods, and facilities. ABA's refusal to approve that of which it disapproves and MSL's demand to differ but be accepted as though it conformed--or as though its differences did not matter--are the bases for this suit.

III. DISCUSSION

A number of courts have considered issues similar to those raised in MSL's complaint. Application of these decisions to the case at bar lead me to conclude that judgment should be entered against MSL.[33]

A. *MSL's Alleged Injury Results from Governmental Action not Private Conduct*

ABA argues that MSL's alleged injury results from the independent decision of the sovereign states to preclude

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[33] As discussed more thoroughly below, no genuine issue of material fact exists. In this regard, it should be noted that although MSL continues to seek further discovery, thus far in this litigation, there have been 44 depositions taken, many of them over multiple days, in 14 states and two countries. Moreover, more than 100,000 pages of documents have already been produced.

graduates of unaccreditated law schools from taking their bar examinations. ABA's position is based on the Supreme Court's seminal decision in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). *Noerr* involved an antitrust claim brought by long distance trucking companies against, *inter alia*, an association of railroads. The plaintiffs alleged that the defendants violated sections 1 and 2 of the Sherman Act by conspiring to restrain trade in, and monopolizing the long distance freight business. *Id.* at 129. The plaintiffs claimed that the defendants had engaged in a propaganda campaign "to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business." *Id.* The Supreme Court held that "where a restraint upon trade and monopolization is the result of a valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* at 136. The Court reasoned that when an antitrust-plaintiff's injury is proximately caused by the government, the government's action constitutes a supervening cause that breaks the chain of causation between an antitrust-defendant's action and any anticompetitive effect. Areeda & Hovenkamp, *Antitrust Law* ¶ 201 at 14 (1994 Supp.).

To decide whether the *Noerr* principles apply, a court should ask: (1) what is the harm that the plaintiff alleges it suffered?, and, (2) is that harm the proximate result of governmental action or private conduct? If the harm results from governmental action, no antitrust liability will lie. Moreover, if the plaintiff alleges two harms, one the proximate result of private conduct and the other the result of governmental action, no liability will attach to the private conduct if the harm associated with that conduct is merely incidental to the

harm associated with the governmental action. *Id.* at 143

Courts have had several opportunities to flush out the extent of *Noerr* immunity in various contexts. In *Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir.1992), *cert. denied*, 114 S.Ct. 551 (1993), the plaintiffs sued the ABA and several other bar associations. They challenged as anticompetitive certain ethical rules adopted by the Illinois Supreme Court and the Northern District of Illinois at ABA's recommendation. The plaintiffs also challenged as anticompetitive certain ethical opinions promulgated by the defendant bar associations. They alleged that the rules and ethical opinions injured them by restricting their ability to advertise and to form partnerships with non-lawyers. *Id.* at 1382.

The Seventh Circuit upheld the district court's dismissal of the plaintiffs' antitrust claim. *Id.* at 1383. Relying heavily on the Supreme Court's decision in *Noerr*, the court found that when a trade association provides information but does not constrain others to follow its recommendations, it does not violate the antitrust laws. *Lawline*, 956 F.2d at 1383 (citing *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir.1989)). The basis for this finding is readily apparent--when a state adopts as its own the conclusions reached by a professional association (in that case the ethical rules and opinions and in this case conclusions about the quality of law school educations), it is the state and not the private party that injures the plaintiff with anticompetitive conduct. *Id.* at 1384. As the Sherman Act does not proscribe states from engaging in anticompetitive conduct, *see Noerr*, no antitrust claim will lie against trade

associations under these circumstances.[34]

In *Sessions Tank Liners, Inc., v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S.Ct. 66 (1994), the Ninth Circuit rejected an antitrust claim brought against a corporation that had caused a prominent standard-setting organization to amend its influential fire code to the disadvantage of the plaintiff. Local governments either formally adopted the organization's standards, or, in some cities and towns where the standards had not formally been adopted, local officials refused to issue permits for structures that did not conform with the standards. *Id.* at 296. The plaintiff alleged that the standards injured its ability to compete for customers. In rejecting the antitrust claim, the court found that the plaintiff's injuries resulted from governmental action, not the defendant's conduct. *Id.* at 296. *Noerr* principles therefore applied to shield the defendant's conduct from potential antitrust liability.

* * *

Plaintiff attempts to distinguish *Noerr*, *Lawline*, and *Sessions*. It argues that the instant case is different from those cases because here, the defendants (not the government) have inflicted the alleged injury. To determine the cause of plaintiff's alleged injury, a brief exploration of that injury is first necessary.

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[34] *See also Sanjuan v. American Bd. of Psychiatry and Neurology*, 40 F.3d 247 (7th Cir. 1994) (Easterbrook, J.) (rejecting an antitrust claim brought against a trade association that declined to "certify" the plaintiff-doctors).

MSL contends that its failure to be accreditated has caused it competitive harm by impairing its ability to solicit prospective students. (Compl. ¶ 41) The lack of accreditation limits its ability to solicit prospective students because many states preclude graduates of non-accreditated schools from taking their bar examinations[35] and non-accreditated schools bear a stigma.[36] (Pl.'s Resp. to Mot. for Summ. J. at 28 n.12,

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[35] An excerpt from Mr. Velvel's deposition aptly states the school's position:

> Question: And it is your belief that the reason that the students are less interested in the school today is because they cannot be admitted to the bar in states other than Massachusetts?
>
> Answer: I am certain of it to a moral certainty, Mr. Pritikin. I think there is no legitimate doubt about it. I don't think that all the fancy lawyers and economists in the world would ever be able to remotely prove the contrary 'cause the contrary is not true.

(Velvel Dep., 8/25/95, at 30:1-15; Velvel Aff., 3/22/95, at ¶ 23(a), Compl. ¶18)

[36] MSL also contends that it has suffered two additional injuries--in an effort to treat its hardworking faculty fairly, to maintain faculty morale, and to "have any chance of accreditation," MSL raised the salaries of its professors and bought more books for its library. (Velvel Aff., 3/22/95, ¶ 41(a); Pl.'s Surreply Br. in Further Opp'n to ABA's Mot. for Summ. J., at 3-5). MSL admits that, notwithstanding the increase, its starting salaries lag behind those at ABA accreditated schools. Despite this fact, MSL has consistently maintained that it has a highly skilled and "hardworking" faculty. (Complaint ¶ 12; Velvel Aff., 3/22/95, ¶ 41(b)). Therefore, although it contends that ABA's standards have artificially inflated faculty salaries, MSL admits that it has been able to avoid some of these high costs without sacrificing quality. Thus, rather than injuring

Compl. ¶ 41). It maintains that both these factors cause it to lose students who would otherwise attend the school.

Any competitive disadvantage that MSL suffers because some sovereign states preclude graduates of non-accreditated law schools from taking their bar examinations cannot be the basis for antitrust liability. This is what *Noerr*, *Sessions*, and *Lawline* say. The states decide who can sit for their bar examinations. I permitted MSL to explore this issue extensively and it has offered no evidence to show that ABA or the other defendants suggest, recommend, or decide who can sit for bar examinations or be admitted to practice in any state. When the impact of these independent governmental decisions is viewed within the context and nature of ABA's activity, it becomes clear that any injury that flows from state rules governing bar admission squarely falls within the prescripts of *Noerr*. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 594 (1988).[37]

MSL. ABA's standards have provided it with a competitive advantage--it can spend less on faculty than ABA schools and still purchase quality teaching services. Moreover, as these additional "injuries" result from MSL's unilateral decisions, I find that they are not an appropriate basis for potential ABA antitrust liability.

[37] MSL also contends that the cases like *Noerr* are inapposite because they involved situations where the plaintiff's injury resulted from governmental adoption of allegedly anticompetitive doctrines, while in the instant case the state governments have merely relied upon ABA's accreditation decisions and not officially adopted the ABA's standards. This argument also misses the mark. In *Sessions Tank Liners*, although many local governments formally adopted the challenged standards into law, in some cities and towns, the standards were enforced not through explicit codification, but rather by having local officials refuse to issue

Moreover, any competitive disadvantage that MSL suffers because it "is stigmatized in jurisdictions in which graduation from an ABA-accreditated law school is not a prerequisite for sitting for the bar examination," also comes within the *Noerr* doctrine (Pl.'s Response to Mot. for Summ. J. at 28 n. 12 (emphasis added); Compl. ¶ 41). Plaintiff alleges that in addition to the injury inflicted by the governmental restrictions, MSL suffers injury purely because of the denial of accreditation. MSL's argument here is no doubt presented in an effort to identify some independent ABA-inflicted injury thus putting this case outside of *Noerr 's* reach. While such an injury, on its face, might appear to be independent from the injury that flows from the governmental restrictions on bar admittance, the Supreme Court rejected a similar argument in *Noerr*, holding:

> the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be

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permits for structures or activities that were inconsistent with the code. 17 F.3d at 296. In these cities and towns, the governments accepted the conclusions that the standards produced without explicitly adopting the standards themselves. *See* Areeda & Hovenkamp, *Antitrust Law*, ¶ 204 at 75-76 (1994 Supp.). This is identical to the instant case, where government has accepted the conclusions that ABA's standards produce without explicitly adopting the standards themselves. The alleged injury in both circumstances, however, is the same: graduates are precluded from being admitted to the practice of law in certain jurisdictions. As discussed, this injury results from a governmental, not private, decision and cannot therefore give rise to antitrust liability.

> weakened, and the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable [our finding that no antitrust claim will lie where governmental action is the proximate cause of the plaintiff's injury]. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted *directly to persuade* anyone not to deal with the truckers.

Noerr, 365 U.S. at 142 (emphasis added).

The Court concluded that absent evidence suggesting that the railroads attempted *directly to persuade* anyone not to deal with the truckers, the loss of customer good will that the truckers suffered was merely *incidental* to the primary protected injury. In other words, if the railroads actively tried to convince people not to hire the truckers, and if as a result customers did not hire the truckers, the railroads' actions would not be protected under *Noerr* -- the railroads' actions would cause an injury independent of the protected injury inflicted by the government. If, on the other hand, the railroads put negative information about the truckers into the marketplace in an effort to influence government action, and if as a result of that information customers chose not to use the truckers, the railroads' actions would be protected as incidental to the protected injury inflicted by the governmental action -- the governmental action would brake the chain of causation between the railroads' actions and the truckers' harm.

Just as there was no finding in *Noerr* that the railroads attempted *directly to persuade* anyone not to deal with the truckers, I find that no factfinder could reasonably conclude that ABA has attempted *directly to persuade* prospective students not to attend MSL. Here, as in *Noerr*, even assuming that MSL's failure to become accreditated resulted in "loss of prestige" or some abstract "stigma,"[38] that injury is incidental to the primary, protected injury resulting from governmental decisions to preclude MSL graduates from taking certain bar examinations.[39]

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[38] I note that any stigma that MSL suffered as a result of ABA denying accreditation must be viewed in context. Since authorizing MSL to grant degrees, the administrative council in charge of educational standards in Massachusetts has repeatedly expressed concern over many aspects of MSL's educational program. In fact, in January of 1994, the council threatened to revoke MSL's degree-granting authority unless MSL could demonstrate that its admissions standards were reliable. (Ex. D in Supp. of ABA's Mot. for Summ. J., p. 2; Fallon Dep. at 54:6). The council was concerned that MSL was matriculating unqualified students so as to finance its more qualified ones. The council also expressed concern over the unprecedented number of formal written student complaints filed against MSL. (Fallon Dep. at 15:20-17).

[39] This conclusion is strengthened by the Ninth Circuit's language in Sessions. Discussing *Noerr*, the Ninth Circuit wrote that:

> The *Noerr* Court also rejected the proposition that petitioning immunity was limited to injuries flowing directly from governmental action. It held that the railroads were also shielded from liability for the harm the truckers suffered in their relationships with their customers. In the Court's view, that injury was "incidental" to the defendant's campaign to influence legislation.

Sessions, 17 F.3d at 299; *see also Allied Tube*, 486 U.S. at 499.

Plaintiff maintains that its ability to compete for students is impaired by the denial of accreditation because: (1) its graduates cannot sit for many bar examinations; and, (2) it has been stigmatized. The former injury is clearly inflicted as a result of state action. Moreover, the latter injury is incidental to the primary protected injury. Therefore, MSL's claims are barred under *Noerr*.

B. *In Denying Accreditation, ABA Merely Expressed its Opinion which is Protected Under the First Amendment*

Although I conclude that MSL's claims are barred by *Noerr* immunity, even assuming that the stigma injury is not incidental to the primary protected injury, MSL's claims still fail.[40] ABA contends that in refusing to accredit MSL, it

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[40] MSL has presented some evidence which might be construed to mean that ABA has attempted directly to persuade potential students to attend accreditated schools. For example, Mr. Velvel has testified that:

> The ABA accreditors thus possess a monopoly not only because in most states it is necessary to graduate from an ABA school in order to take the bar examination and practice law, but also because *by continuous efforts they have persuaded potential law school applicants*, employers and the public that ABA accreditation is a *sine qua non* of quality and should be regarded as essential even in states (like Massachusetts) where the graduates of an unaccreditated school such as MSL can take the bar examination and practice law.

Here Velvel is not talking about injury to MSL, but to the reason why he feels ABA has an accreditation monopoly. He goes on, however,

> Many other persons who would otherwise apply to and attend MSL will not do so even though they wish to practice law in Massachusetts, where MSL graduates can take the bar

merely rendered its opinion about whether the plaintiff met certain quality standards and that this opinion is protected speech under the First Amendment. There is support for ABA's position. *See, e.g., Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96, 98 (E.D. Va. 1989). Plaintiff maintains that ABA's argument "is patently frivolous."

It is axiomatic that the First Amendment protects speech, not action. Thus, the speech component involved in ABA's promulgation of standards is protected by the First Amendment and, because the Constitution trumps the Sherman Act, this speech component cannot be the basis for antitrust liability. However, any *conduct* associated with the standards is not entitled to First Amendment protection. Put differently, the *conduct* forming the basis of a restraint of trade or a monopolization is outside the First Amendment's reach. This flows logically from section 1 of the Sherman Act which requires "concerted *action* that unreasonably restrains trade."

> examination and practice law. The reason [these people] will not apply to MSL is that *the ABA has persuaded them and others that a law school cannot be a quality law school if it is not ABA accreditated.*

(Velvel Aff., 3/22/95, at ¶ 27, ¶ 28(a) (emphasis added)).

This statement merely points out what the ABA contends are the benefits of its accreditation product. While the corollary of attending an accredited school is not attending a school that has not been accredited, the injury remains incidental to the government's action. There is nothing wrong with the ABA's marketing its product -- nothing wrong with its contending that its evaluation process provides benefits to prospective students and to the profession. The fact that various states agree does not make what ABA does unlawful.

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania, 745 F.2d 248, 256 (3d Cir. 1984) (emphasis added)

Thus, in *Allied Tube*, the First Amendment did not insulate a trade association where the association's members included consumers, distributors, and manufacturers, and any agreement to exclude a particular product from certification was "an implicit agreement not to trade in that type of [product]." *Allied Tube*, 486 U.S. at 508. This implicit agreement--not the act of promulgating the standards--was the conduct forming the basis for antitrust liability. In fact, the Court explicitly emphasized that antitrust laws circumscribe the "conduct" of standard-setting associations. *Id.* at 506, *see also National Soc'y of Professional Eng'r, Inc. v. United States*, 435 U.S. 679 (1978) (antitrust violation properly asserted against association whose members *boycott* those manufacturers which do not follow association's position). Conversely, in *Schachar*, the court found no antitrust violation where a medical association publicly stated its belief that a surgical procedure was "experimental" and should not be performed absent more research. The association did not require its members to desist from performing the operation or forbid its members from associating with those who chose to perform the operation. 870 F.2d at 398. Unlike *Allied*, where the association's promulgation of standards led to conduct that could be the basis for antitrust liability, the association in *Schachar* merely stated its position. It took no action on which to predicate antitrust liability. By merely stating its position, the association in *Schachar* did not "restrain trade" or monopolize the industry *vis-a-vis* the association in *Allied* which restrained trade by implicitly agreeing not to trade in a product. *See also Consolidated Metal Prods. v. American*

Petroleum Inst., 846 F.2d 284, 293 (5th Cir. 1988) (holding no antitrust violation where trade association provides information but does not constrain others to follow its recommendations), *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988) [41]

When an association merely states its position, and a company is stigmatized because of that statement, there is no basis for antitrust liability.[42] ABA's constitutionally protected expression of its views and any resulting stigma that MSL suffers do not amount to ABA *conduct* on which to establish

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[41] MSL reasons that if extended to its logical extreme, this First Amendment analysis would protect "discussions by price fixing conspirators about the reasonable level at which prices should be adhered to in the marketplace...." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30). However, the problem with MSL's reasoning here is that the illustration that it cites as the "logical extreme" involves *conduct*--conspiring to fix prices. In fact, in order for a conspiracy to fix prices to be actionable, there must be an *overt act*. *United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir. 1993). This *act* or *conduct* is not protected by the First Amendment. MSL concedes as much when it states that this First Amendment rationale "can fare no better than an argument that the restrictive trade association *activities* involved in *Allied Tube* should be exempt from the antitrust laws...." (Pl.'s Resp. to Def. ABA's Mot. for Summ. J. at 30 (emphasis added)). *Allied* involved restrictive *activities*, not expression. Moreover, it is a fallacy to suppose that just because a core concept of antitrust law cannot logically be extended indefinitely that the core concept is faulty.

[42] This is different from the situation where an association states its position and then engages in conduct related to its stated position because where there is *conduct*, there is a basis for antitrust liability--the association has gone *beyond expression*.

potential antitrust liability.[43] Like *Schachar*, ABA does not restrain trade or monopolize an industry by speaking out on an issue. ABA is entitled to state its position, provided it does not go further and somehow penalize those who do not subscribe to its position. *See Schachar*, 870 F.2d at 399 ("An organization's towering reputation does not reduce its freedom to speak out"). If stigma results from simple expression, that stigma is incidental to the speech and cannot be the basis for antitrust liability. For example, in *Schachar*, the court found that the surgeons who performed the surgery were stigmatized by the association's warning and that this stigma led to a drop in business.[44] However, the court did not find any antitrust

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[43] The governmental decision to exclude graduates of unaccreditated schools from taking certain bar examinations is protected under *Noerr*. Because governmental action is responsible for this injury, ABA *conduct* is *not*.

[44] MSL might attempt to distinguish the *Schachar* analogy by reasoning that, unlike the plaintiff in that case, it challenges ABA *standards* not ABA accreditation decisions. However, this is a distinction without a difference. No doubt, the association in *Schachar* maintained some standards. One standard might have provided that:

> a procedure is termed "experimental" until it has undergone two years of testing.

However, even if the association maintained such a standard, there is no *conduct* on which to base antitrust liability because by promulgating this standard, the association has done nothing more than to express its views on when a procedure is safe to perform. The situation would be different if the association's standard provided that:

> a procedure is termed "experimental" until it has undergone two years of testing and no member of the association shall deal or otherwise transact business with a doctor who performs

violation. This conclusion is sound. A contrary result leads to the anomalous situation that antitrust liability would attach to associations that put persuasive speech into the marketplace of ideas but not to those that put forth fluff. Antitrust laws do not exist to stifle the effects of speech. They exist to protect consumers and to stop conduct that disrupts the marketplace. Thus, any stigma that MSL has suffered because of ABA's not listing MSL as an accreditated school does not provide the necessary offensive conduct for antitrust liability.

It is clear that ABA does not violate the Sherman Act when it merely publishes quality standards or expresses its views on which schools provide quality educations. Publication of an association's views, without more, is protected speech. Only ABA *conduct* can trigger antitrust liability. Abstract stigma that flows from the publication of speech protected by the First Amendment is not enough.

The plaintiff in *Allied* produced plastic electrical conduit. Law schools *produce* educations. The association in *Allied* violated the antitrust laws by requiring its members not to deal with manufacturers of plastic conduit. This *conduct* violated the Sherman Act. ABA would violate the Sherman Act if it required its members not to deal with unaccreditated schools (analogous to the manufacturers of plastic conduit in *Allied*). For example, ABA could not tell its members not to teach at unaccreditated schools (limit the supply of production

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"experimental" procedures.

In this latter scenario, the association has engaged in *conduct* directed at restraining trade. However, there was no such conduct in *Schachar* as there is no such *conduct* in the instant case.

resources), work with graduates of unaccreditated schools (limit customer base), or refer cases to graduates of unaccreditated schools (interfere with the manufacturer's business). However, ABA does none of these things. It does not keep its members from hiring graduates of unaccreditated law schools. It does not restrict its members from making referrals to graduates of unaccreditated law schools. It does not forbid its members from dealing with graduates of unaccreditated law schools. It does not stop its members from teaching at unaccreditated law schools. It does not prevent graduates of unaccreditated law schools from joining ABA.[45] In fact, ABA in *no* way *acts* against schools that fail to satisfy its quality standards.[46] It does not even review schools that do

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[45] A quick search in Martindale-Hubbel revealed that at least six MSL graduates have already joined ABA.

[46] In its complaint, MSL points out that its students cannot transfer their credits to ABA accreditated law schools, and its students cannot obtain LL.M. degrees from ABA accreditated law schools. (Complaint ¶¶ 37(d), 37(e)). Although an argument might be made that these two rules amount to ABA conduct, I find that such alleged conduct is insufficient to preclude summary judgment. First, MSL has not produced *any* evidence indicating that it has been injured because of these two ABA rules. In fact, there is evidence indicating that MSL vigorously attempts to frustrate any student from transferring to an ABA-accreditated law school by withholding transcripts and generally not cooperating with transfer efforts. In one instance, an MSL student needed to commence a lawsuit against the school to release her transcripts. *Riley v. Massachusetts School of Law, Inc.*, No. 91-910 (Sup. Ct. Mass.) Mr. Velvel had refused to cooperate with the student's transfer efforts because he maintained that the student had entered the school in bad faith, not intending to graduate, but instead planning all along to transfer to an accreditated school. Moreover, the council in charge of higher education in Massachusetts noted:

not wish to be considered for accreditation. If they wish, schools can simply disregard ABA's standards.[47] ABA imposes no penalty on these schools and the injury associated with the governmental action to preclude graduates of unaccreditated schools from sitting for some bar examinations is not ABA conduct. Indeed, ABA engages in no conduct that can trigger antitrust liability.[48] It merely expresses its views on

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> we continue to receive complaints from students who are unable to resolve complaints on their own with the law school. This includes the law school's refusal to accept certified mail from students, and difficulties in obtaining transcripts and other information from various members of the administrative staff.

(Def.'s Ex. D to Mot. for Summ. J., at 3).

Second, these ABA rules are essentially extensions of the protected speech. ABA's speech would be meaningless if students of unaccreditated schools could shoe-horn their unaccreditated credits into an ABA accreditated law school.

[47] In fact, if a school disagrees with the standards, it should not simply pay lip service to them. Indeed, at least some members of MSL's faculty appear to agree with this sentiment as Mr. Velvel noted that "[t]here are people on our faculty who believe we'd be better off without [ABA accreditation]." Dick Dahl, *Massachusetts Weekly*, January 18, 1993, "A Maverick Law School's Maverick Pitch."

[48] Nor do any of the other defendants engage in conduct detrimental to MSL's ability to compete for customers. Just like ABA, these other defendants may express opinions about quality within the profession, but they take no affirmative action. MSL maintains that LSAC also excludes it from certain LSAC recruitment forums. (Plf.'s Resp. to ABA's Mot. for Summ. J., Vol. II, at 120). MSL might contend that this is "conduct" which, through its conspiracy theory, is relevant in taking this case outside of the First Amendment's protection. However, as Judge Easterbrook noted in *Schachar*, "[a]ntitrust law does not compel your

which law schools employ sound teaching methods. Such expression is protected under the First Amendment and cannot be the basis for Sherman Act liability.

IV. CONCLUSION

The ABA, in the view of the 50 states, is quite good at setting standards for legal educators. As evidence of this, each state has concluded that graduation from an ABA accreditated law school is a sufficient basis to sit for its bar examination. The fact that the ABA has a reputation for being good at what it does, and that the states have elected to rely on the ABA accreditation process, does not transform that process, which is itself binding on absolutely no one absent state action, into an antitrust violation. If, the effect of governmental reliance on ABA accreditation decisions is to "freeze out" lower income people, to raise faculty salaries unfairly, and to require law schools to have too many books on their shelves, then any disgruntled law school, dean, student, or citizen can petition the state legislature to abandon its reliance on the ABA process. The answer is not to assail the ABA which has no authority over who may sit for bar examinations. The answer is to utilize the democratic process, for it is that process that gives force to the standards. Plaintiff's alleged injury that flows from governmental decisions to preclude graduates of unaccreditated law schools

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competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law." 870 F.2d at 399. MSL cannot use the Sherman Act to compel LSAC, one of the organizations that administers the LSAT which MSL has publicly rejected as racially biased and unreliable, to assist MSL in marketing its product.

from sitting for certain bar examinations, is protected under *Noerr*, and cannot be the basis for ABA liability.

If MSL is independently stigmatized because of ABA's denial of accreditation, that injury results from ABA's protected freedom of expression and not because of ABA's conduct. The Sherman Act regulates conduct, not speech. No factfinder could reasonably conclude that ABA has engaged in conduct that triggers antitrust liability.

Finally, judgment should also be entered in favor of the other defendants in this case. In its complaint, MSL contends that the ABA's adoption and approval of the *standards* have the purpose and effect of restraining trade and that the defendants have worked in concert, using some of the ABA's standards, to monopolize the law school accreditation process. As I have found that maintaining the standards does not violate the Sherman Act, there is no basis for liability against the other defendants either. I will therefore enter judgment in their favor as well.[49] An appropriate order follows.

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[49] As I have found that MSL's alleged harm is not a proper basis for recovery, I need not consider the other grounds for summary judgment raised in ABA's motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.	:	CIVIL ACTION No. 93-6206
vs.	:	
AMERICAN BAR ASSOCIATION, et al.	:	

ORDER

AND NOW, this 29th day of August, 1996, the American Bar Association's motion for summary judgment is hereby granted and judgment is entered in favor of the American Bar Association, Law School Admission Services (LSAS), Law School Admission Council (LSAC), and the Association of American Law Schools (AALS), and against plaintiff on all counts. It is hereby further ordered that the motions for summary judgment submitted by AALS, LSAS, and LSAC are denied as moot.

BY THE COURT:

s/ J. William Ditter, Jr., J.

FILED AUGUST 29, 1996

ENTERED: 8·30·96
CLERK OF COURT

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U.S.
FILED
JUN 30 1997
CLERK

No. 96-1898

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.,
Petitioner,
v.
AMERICAN BAR ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BAR ASSOCIATION

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June 30, 1997

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QUESTIONS PRESENTED

1. Whether the courts below properly held that respondent American Bar Association was entitled to summary judgment dismissing petitioner's claim under 15 U.S.C. §§ 1-2 where (a) petitioner sought to hold respondent liable for alleged injuries caused by the actions of the states applying their own bar admission rules, (b) petitioner sought to hold respondent liable for an alleged "stigma" incidental to respondent's successful efforts to influence state bar admission decisions, and (c) petitioner failed to raise a genuine issue of material fact relating to the additional direct injuries allegedly caused by respondent?

2. Whether the court of appeals properly held (a) that the district court did not abuse its discretion in denying petitioner certain discovery that was not material to the grounds on which the court entered summary judgment, and (b) that the district court did not abuse its discretion in partially disqualifying three of petitioner's faculty members from performing certain functions as counsel for petitioner?

LIST OF PARTIES AND AFFILIATES

The caption of the case in this Court and the list on page ii of the petition contain the names of all parties. Respondent American Bar Association is a not-for-profit corporation organized under the law of Illinois. Pursuant to S. Ct. Rule 29.6, the American Bar Association states that it has no parent or subsidiary companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1898

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.,
Petitioner,

v.

AMERICAN BAR ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN BAR ASSOCIATION

Respondent American Bar Association ("ABA") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Massachusetts School of Law at Andover, Inc. ("MSL"). The petition should be denied for the following reasons: (1) the decision of the court of appeals does not conflict with any decision of this Court or other courts of appeals and, in any event, is entirely correct; and (2) the petition rests on mere disagreements with the lower courts' conclusion that petitioner failed to raise a genuine issue of material fact relating to its claims and on the courts' alleged misapplication of properly stated rules of law to the factual record.

COUNTERSTATEMENT OF THE CASE

1. The ABA is a non-profit professional organization of attorneys whose membership is open to members of the bar of the 50 states and the territories of the United States, including graduates of law schools not accredited by the ABA. (Pet. App. 5A-7A; C.A. App. 1338, 3377.) Legal education and bar admissions have been a central concern of the ABA since its founding in 1878. (Pet. App. 6A; C.A. App. 2957-58.) Under the direction of Elihu Root, Chair of the ABA Section of Legal Education and Admissions to the Bar (the "Section") during 1920-22, the ABA first developed a set of accreditation standards establishing minimum criteria for programs of legal education. (Pet. App. 6A; C.A. App. 49, 2957-58.)

Since that time, the ABA has petitioned the highest court in each state to rely on ABA accreditation decisions in connection with bar admission decisions, and it continues regularly to communicate its opinions concerning accreditation and bar admission matters to the states. (Pet. App. 6A; C.A. App. 2958, 3618-19, 3623-53.) For example, the ABA informs state supreme courts and state boards of bar examiners of its accreditation decisions and annually sends them a list of all law schools accredited by the ABA. (Pet. App. 6A; C.A. App. 3618-19.) As a result of these efforts, under the bar admission rules of all 50 states and the District of Columbia, graduation from an ABA-accredited law school satisfies the legal education requirement for admission to the bar. (Pet. App. 6A; *see also* C.A. App. 1396-1409.)[1]

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[1] In addition, the Council of the Section has been recognized since 1952 by the U.S. Secretary of Education and his predecessors "as the national agency for accreditation of professional schools of law" and a "reliable authority" concerning the quality of legal education. (Pet. App. 6A; C.A. App. 3378.)

Numerous states recognize other ways of satisfying the legal education requirement for bar admission, and an individual applicant or law school can, in each state, petition for revision or waiver of state bar admission rules. (*See* Pet. App. 6A-7A; C.A. App. 1396-1409.) For example, the New Hampshire Supreme Court and the Maine Supreme Judicial Court have granted petitions filed by MSL to allow its graduates to take the bar examination in those states, even though the courts' rules require bar applicants to graduate from an ABA-accredited law school. (Pet. App. 7A; C.A. App. 3168; *In re Massachusetts School of Law*, Docket No. SJC-230 (Me. Dec. 24, 1996). In addition, petitions allowing individual MSL graduates to take the bar examination have been granted in the District of Columbia and Maryland. (Pet. App. 7A; C.A. App. 3484.) All told, MSL graduates can take the bar examination immediately after graduation in California, Maine, Massachusetts, New Hampshire, Vermont, and West Virginia and, in 12 other states, after practicing for a prescribed period in another jurisdiction. (Pet. App. 7A; C.A. App. 3483-84.)

2. Accreditation by the ABA is voluntary and open to any law school that submits an application to the ABA. (Pet. App. 7A; C.A. App. 3378.) The ABA grants provisional accreditation to applicant law schools that substantially comply with the ABA's accreditation standards and give assurance that they will be in full compliance within three years. (Pet. App. 7A; C.A. App. 845.) During the time period relevant to this case, there were 177 ABA-accredited law schools in the United States, as well as over 50 schools, including MSL, that were not ABA-accredited but had received some form of approval from individual states. (Pet. App. 6A.)

3. MSL conducted its first classes in 1988. (*Id.* at 5A; C.A. App. 917.) In May 1990, MSL received authority from the Board of Regents of the Commonwealth

of Massachusetts to award the *juris doctor* to its graduates. (C.A. App. 2.) That authority enables MSL's graduates to take the bar examination in Massachusetts and several other states. (C.A. App. 12-13; 3483.)

MSL applied to the ABA for accreditation in the fall of 1992 and early 1993. (Pet. App. 9A.) In connection with its application, MSL demanded that the ABA grant a wholesale waiver relieving MSL from complying with the ABA's accreditation standards. (*Id.* at 9A-10A; C.A. App. 845-47, 4065.) In a letter to MSL's trustees written shortly before submitting its application, MSL's dean outlined his strategy to gain accreditation without complying with the ABA's accreditation standards. (C.A. App. 3441-58.) In that letter, the dean set forth his conviction that if the ABA "is given reason to believe it is facing a tiger, it will seek to quickly come to a reasonable accommodation with MSL—it will probably, in fact, give way to most or all of our views." (*Id.* at 3452-53.)

MSL's strategy was premised on the dean's belief that the ABA would be financially vulnerable to a sustained, expensive litigation attack:

> Perhaps the most important fact I learned at the ABA convention in Dallas is this: The ABA ran a deficit of two million dollars last year, and is in desperation about insufficient revenues. . . .
>
> The ABA's financial straits are crucially important because . . . the lawyers needed to defend serious lawsuits cost a small fortune. The ABA will not want and cannot afford the heavy fees it would have to spend to defend against a suit by MSL. The ABA's counsel . . . will advise the ABA to expect to have to fund a war if MSL sues . . . . Given the financial straits the ABA is in, I do not believe it will want any part of this.

(*Id.* at 3456.) By August 1994, after only six years in operation, MSL had amassed a war chest—through annual surpluses funded out of tuition paid by MSL students—of

approximately $7 million to fund its litigation with the ABA. (C.A. App. 1203-04.)

The ABA considered MSL's application for accreditation in accordance with the ABA's established procedures. (*See* Pet. App. 10A.) Pursuant to these procedures, the ABA conducted a site evaluation of MSL, and MSL submitted extensive information to the ABA in support of its application including, among other things, written responses to the site evaluation report and the recommendations of the Accreditation Committee and the Council of the Section. (C.A. App. 50-51, 693-792, 905-06, 911-91.) In addition, representatives of MSL appeared before the Accreditation Committee, the Council and the House of Delegates. (C.A. App. 50-51, 837-38, 905-06, 3385.) Ultimately, the ABA denied MSL's application based on MSL's failure to comply with the ABA's accreditation standards in eleven substantive respects. (*See* C.A. App. 45-47, 845-46, 905-09, 3385.)

MSL commenced this action on November 23, 1993, alleging that defendants violated Sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1-2. (C.A. App. 24-25.) After an extended period of discovery during which MSL took 32 depositions and respondents produced over 70,000 pages of documents, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206 at 2 (E.D. Pa. July 29, 1996), the ABA filed a motion for summary judgment seeking dismissal of MSL's claims.[2]

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[2] While the ABA's summary judgment motion was pending, MSL filed a second lawsuit in Massachusetts state court asserting claims for breach of contract, misrepresentation and unfair trade practices against the ABA, AALS and 14 individuals, including 12 of the defendants in this action. That lawsuit, which also arose out of the ABA's denial of MSL's application for accreditation, was subsequently removed to the United States District Court for the District of Massachusetts. Earlier this year, the court entered summary judgment dismissing MSL's claims against all defendants. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No.

On August 30, 1996, the district court entered summary judgment dismissing MSL's claims. (Pet. App. 43A-66A.)[3] The court held, based on *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and the record evidence, that MSL failed to establish that it had suffered a cognizable antitrust injury. (Pet. App. 47A-65A.)

The court of appeals unanimously affirmed, concluding, as the district court had found, that "MSL has failed to demonstrate an injury for which antitrust liability may lie, ..." (Pet. App. 35A.) Specifically, the court held that MSL could not, as a matter of law, recover damages for any of the three types of injury that it alleged were caused by the ABA's actions. First, the court held that defendants were immune from antitrust liability for injury allegedly suffered as a result of decisions by the states that graduates of law schools not accredited by the ABA may not be admitted to the bar. (*Id.* at 20A-24A.) Second, the court held that defendants could not be liable for an alleged "stigma" or "loss of prestige" arising from the ABA's decision to deny MSL's application for accreditation. The court held that the alleged injury was incidental to the ABA's efforts to petition the states in con-

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95-12320-MEL, 1997 U.S. Dist. LEXIS 7033 (D. Mass. May 8, 1997) (entering summary judgment for ABA and individual defendants); *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 95-12320-MEL, 1997 U.S. Dist. LEXIS 3430 (D. Mass. Mar. 3, 1997) (entering summary judgment for AALS).

[3] The individual defendants named in the complaint had previously been dismissed by the district court for lack of personal jurisdiction. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374 (E.D. Pa. 1994). The other defendant organizations, the Association of American Law Schools, Inc. ("AALS") and the Law School Admission Council and Law School Admission Services, Inc. ("LSAC/LSAS"), moved for summary judgment as well. Upon entering summary judgment in favor of all defendants, the court dismissed the separate motions filed by AALS and LSAC/LSAS as moot. (Pet. App. 66A.)

nection with bar admission decisions. (*Id.* at 24A-28A.) Third, the court held that MSL had failed to come forward with evidence sufficient to raise a genuine issue of material fact that it had been injured by enforcement of ABA accreditation standards concerning faculty salaries, transfer credits, and admission into post-J.D. degree programs. (*Id.* at 28A-33A.) The court of appeals also found that the district court did not abuse its discretion in its discovery rulings or in its order disqualifying certain MSL faculty members from acting as trial counsel, giving oral argument, and taking depositions. (*Id.* at 14A-18A, 41A-42A.)

REASONS FOR DENYING THE PETITION

Contrary to MSL's assertion that the decision of the court of appeals "establishes a sweeping new antitrust immunity" (Pet. 13), the court simply applied well-settled principles of law to the unique facts of this case. The primary injury for which MSL sought recovery in the district court was an alleged loss of enrollment and tuition income due to the inability of its graduates to take the bar examination in particular states. (*See* C.A. App. 2, 12-14, 15-17, 19, 20, 22-24.) The decision of the court of appeals that the ABA cannot be held liable for bar admission decisions made by the states creates no conflict with the decisions of this Court or other courts of appeals.

In addition to this primary alleged injury, MSL offered alternative theories of recovery during the course of the litigation. Under its second theory, MSL sought to recover damages for an alleged "stigma" arising from the ABA's decision to deny MSL's application for accreditation. Once again, the decision of the court of appeals that the alleged "stigma" was incidental to the ABA's efforts to influence state bar admission decisions creates no conflict with the decisions of this Court or other courts of appeals.

Finally, MSL asserted late in the litigation that it had suffered direct injury as a result of the ABA's enforcement of its accreditation standards concerning faculty salaries, transfer credits and admission into post-J.D. degree programs. Both the district court and the court of appeals concluded that MSL failed to come forward with sufficient evidence to raise a genuine issue of material fact that it had been injured by those accreditation standards. MSL's mere disagreement with the factual determinations of the lower courts provides no basis for granting the petition.

1. MSL may not recover from the ABA for injury allegedly suffered as a result of the actions of the states. MSL seeks to hold the ABA liable for the decisions of state supreme courts that graduates of law schools not accredited by the ABA may not be admitted to the bar. As the court of appeals found (Pet. App. 20A), it is well established that each state possesses "the authority to decide what applicants may take its bar examination and may be admitted to the bar." *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) ("Pursuant to the State Constitution the Arizona Supreme Court has plenary authority to determine admissions to the bar").[4] It is similarly well settled that economic consequences flowing directly from restraints imposed by the operation of state law fall out-

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[4] *See also, e.g., In re Murphy*, 393 A.2d 369, 371, 374 (Pa. 1978) (authority over bar admission "exercised [] exclusively by the Supreme Court"), *cert. denied*, 440 U.S. 901 (1979); *In re Hansen*, 275 N.W.2d 790, 796 (Minn. 1978) ("We have not delegated our authority to the ABA but, instead, have simply made a rational decision to follow the standards of educational excellence it has developed"), *cert. denied*, 441 U.S. 938 (1979); *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036, 1040 (D. N.J. 1975) (state's adoption of "the standards of an approving body does not support a conclusion that such adoption is an abrogation or delegation of the power or duty to supervise the practice of law in this State"), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

side the scope of the Sherman Act. *Parker v. Brown*, 317 U.S. 341, 352 (1943); *Hoover*, 466 U.S. at 573-74.

MSL may not circumvent this principle by suing private parties, such as the ABA, whose views have influenced the state action at issue. *Noerr*, 365 U.S. at 135-36; *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965). As this Court observed in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383 (1991), "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government."

The decision of the court of appeals affirming dismissal of MSL's claims on this issue represents a straightforward application of well-settled law that is consistent with the decisions of other courts of appeals.[5] For example, in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 513 U.S. 813 (1994), the defendant convinced a private association to amend its code in such a way as to exclude use of the plaintiff competitor's product in those municipalities that relied on the code. The court held that the defendant was immune from antitrust liability because the plaintiff's alleged injuries "flowed directly from government action," even in those markets where the government had not

[5] *See also Lawline v. American Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (holding ABA not liable for antitrust injury resulting from state supreme court's adoption of ethical standards developed by ABA), *cert. denied*, 510 U.S. 992 (1993); *Sherman College of Straight Chiropractic v. American Chiropractic Ass'n*, 654 F. Supp. 716, 722-23 (N.D. Ga. 1986) (holding accreditor immune from antitrust liability for injury arising from state decisions to deny licenses to graduates of unaccredited schools), *aff'd*, 813 F.2d 349 (11th Cir.), *cert. denied*, 484 U.S. 854 (1987). *See also Zavaletta v. American Bar Ass'n*, 721 F. Supp. 96 (E.D. Va. 1989) (dismissing antitrust claims of students at unaccredited law school based on *Noerr* doctrine).

adopted, but merely relied on, the code. *Id.* at 299. Conversely, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), on which MSL heavily relies (*see* Pet. 19-23), is inapposite because the Court explicitly excluded from consideration any injury resulting from government action. 486 U.S. at 498 n.2, 500.

As the court of appeals observed, MSL has identified no judicial authority supporting a conclusion to the contrary. (Pet. App. 22A-24A & n.8.) Nor did the U.S. Department of Justice, in its *amicus* brief filed in the court of appeals, question the lower court's holding on this issue. (Brief of *Amicus Curiae* United States at 9-10 (Oct. 28, 1996) (taking no "position on the district court's holding that MSL cannot recover for any injury it suffered as a result of state decisions to adopt ABA standards"), *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (No. 96-1792) [hereinafter ("Gov. Br.")].)

MSL's reliance on a line of cases holding that anticompetitive restraints directly imposed by private parties are not immunized by state authorization of that conduct is similarly unavailing. As the court of appeals observed, each of those cases involved private restraints of trade that were self-executing—independent of state law—and led directly to the alleged antitrust injury. (*See* Pet. App. 22A.)[6] In each of those cases, the Court rejected the

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[6] *See Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 627 (1992) (private price-fixing agreement); *Patrick v. Burget*, 486 U.S. 94, 105 (1988) (medical review board termination of competing doctor's staff privileges); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (price-fixing); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 581 n.3 (1976) (tying). The appellate decisions cited by MSL are to the same effect. *See Litton Systems, Inc. v. American Tel. and Tel. Co.*, 700 F.2d 785, 806-08, 814-16 (2d Cir. 1983) (predatory conduct); *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 482, 484 (4th Cir. 1980) (concerted refusal to deal).

defendant's arguments that state authorization of the private anticompetitive conduct immunized the private actors.

Here, by contrast, it is the application by state supreme courts of state bar admission rules that caused the alleged injury about which MSL complains. (*See* Pet. App. 23A n.9 ("MSL continues to miss the crucial point that it is the direct action of the states which causes its injury").) MSL's arguments that the states have not authorized or supervised the ABA's accreditation activities are therefore beside the point because, as the Court stated in *Hoover*, "[w]here the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of clear 'articulation' and 'active supervision.' " 466 U.S. at 569. (*Accord* Pet. App. 21A ("Because the states are sovereign in imposing the bar admission requirements, the clear articulation and active supervision requirements urged by MSL are inapplicable"), 25A n.11 ("MSL seriously misstates the *Noerr* doctrine").)

2. MSL may not recover for an alleged "stigma" or "loss of prestige" arising from the ABA's denial of MSL's application for accreditation. Because the "stigmatic" injury alleged by MSL is incidental to the ABA's efforts to petition the states in connection with bar admission decisions, the court of appeals properly held that MSL's "stigma" claim is barred by *Noerr*.

In *Noerr*, the Court held that injuries "incidental" to legitimate efforts to influence government lie outside the reach of the Sherman Act, even where such efforts were made as part of a deceptive publicity campaign that had the purpose and effect of poisoning customer relationships. 365 U.S. at 142-44. The Court explained that it is "inevitable" that "an incidental effect" of such a campaign "may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id.* at 143. Allowing plaintiffs to recover for such injuries would "be tantamount to outlawing all such

campaigns," a result the Sherman Act was not intended to achieve. *Id.* at 143-44. The Court drew the line at particularized "attempt[s] to interfere directly with the business relationships of a competitor," concluding that the absence of any evidence "that the railroads attempted directly to persuade anyone not to deal with the truckers" was dispositive of the plaintiffs' antitrust claims. *Id.* at 142-44.

That same result follows here *a fortiori*. The court of appeals found, on the record before it, that for the past 70 years the ABA has "petitioned the states in a campaign to prohibit graduates from unaccredited schools from taking bar examinations." (Pet. App. 6A, 26A-27A. *See* C.A. App. 2958, 3618-19.) Indeed, MSL admitted in both the district court and the court of appeals that the ABA engaged in petitioning activity. (C.A. App. 128, 134-35, 139 (MSL motion to compel (Mar. 10, 1994)); Brief of MSL at 15-16, 51 (Oct. 21, 1996), *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (96-1792).) As part of this activity, the ABA communicates its accreditation decisions to the states, defends the criteria on which those decisions are based, and regularly opposes efforts to allow graduates of law schools not accredited by the ABA to take the bar examination. (Pet. App. 6A, 27A; C.A. App. 2958, 3618-19, 3623-53.) Moreover, the court of appeals found that there was no evidence that the ABA had attempted to persuade anyone not to deal with MSL. (Pet. App. 27A-28A.) Therefore, the court properly held that any "stigma" suffered by MSL was purely incidental to the ABA's legitimate petitioning activity.

This part of the decision of the court of appeals again represents a straightforward application of well-settled law. The decision does not create a conflict with other courts of appeals; as the court noted here, it is well-established that "loss of prestige resulting from a refusal to approve

a product or service does not alone make out an antitrust claim" (Pet. App. 26A).[7] Nor did the Department of Justice disagree with this holding in the court of appeals; indeed, in its amicus brief filed in the court of appeals, the Government recognized that "[a]ntitrust defendants are not liable for any anticompetitive effects of legitimate petitioning efforts, even if those efforts have an incidental or derivative effect on private market behavior because, to construe the Sherman Act otherwise, would unduly chill important First Amendment activities." (Gov. Br. at 11-12.)

MSL does not challenge this legal standard, but rather disagrees with the court's application of that standard to the unique facts of this case. Once again, MSL relies heavily on *Allied Tube*, which the court of appeals properly found to be inapposite. In *Allied Tube*, this Court concluded that the actions of a group of manufacturers to exclude the plaintiff competitor's product from the National Electric Code constituted an anticompetitive agreement among manufacturers, distributors and consumers not to trade in the plaintiff's product. 486 U.S. at 507. Cautioning that its holding represented a "close" question grounded in the specific "context and nature" of the activity at issue, the Court found that the defendant's actions constituted "anticompetitive commercial activity" that had a market impact independent of any

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[7] *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251-52 (7th Cir. 1994) (rejecting antitrust claim for damages caused by defendant's failure to certify plaintiff doctors), *cert. denied*, 116 S. Ct. 1044 (1996); *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (rejecting antitrust claim for damages caused by the defendant's failure to approve plaintiffs' medical procedure); *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988) (rejecting antitrust claim for damages caused by trade association's unjustified denial of request for product certification). *See also Sessions Tank*, 17 F.3d at 299 (stating antitrust immunity attached to alleged injury incidental to valid petitioning activity).

petitioning activity and was therefore not immune under *Noerr*. *Id.* at 507 & n.10.

By contrast, MSL's alleged injury arose from the ABA's communication of its accreditation decisions to the states and the public, which is precisely the speech protected under *Noerr*. Based on the factual record before it, the court of appeals distinguished *Allied Tube*, finding that there was no evidence that the ABA had attempted to interfere with MSL's commercial relationships and concluding that the ABA's communication of its accreditation decisions was not "commercial activity" and did not involve an anticompetitive restraint of trade. (Pet. App. 25A-26A.) MSL's disagreement with the factual determinations of the court of appeals provides no basis for review by this Court.

3. The court of appeals properly affirmed the trial court's dismissal of MSL's claims that it suffered direct injury caused by the ABA's accreditation standards relating to faculty salaries, the acceptance of transfer credits earned at law schools not accredited by the ABA, and the admission into post-J.D. programs of graduates of unaccredited law schools. Contrary to MSL's hyperbolic assertions, however, the decision of the court of appeals was based, not on a "sweeping new antitrust immunity for price fixing agreements, boycotts and other anticompetitive actions" (*see* Pet. 13, 15, 22, 26, 29), but rather on the court's conclusion that MSL had failed to come forward with evidence to raise a genuine issue of material fact that it had been injured by those accreditation standards (Pet. App. 28A-33A).

MSL's assertion that the court's decision "amounts, for practical purposes, to *virtual per se immunity*" for the ABA (Pet. 15 (original emphasis)), is refuted by the plain language of the court's opinion. Indeed, the court of appeals explicitly recognized that, "[a]lthough the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have

graduated from an ABA-accredited law school and from any stigma injury resulting from the denial of accreditation under the *Noerr* petitioning doctrine, the ABA is not immune in the actual enforcement of its standards." (Pet. App. 28A-29A.)

Both the district court and the court of appeals simply found that there was no evidence to support MSL's assertions of injury. (Pet. App. 29A-33A, 51A n.36, 62A n.46.) First, the court of appeals found that the ABA did not base its denial of MSL's application for accreditation on the level of faculty salaries paid by MSL. (Pet. App. 29A.)[8] Second, relying on MSL's own admissions, the court found that MSL had not raised its faculty salaries in an attempt to comply with the ABA's accreditation standards. (*Id.* at 30A-31A.) Third, the court found that the ABA's accreditation standards had not raised salary levels in the market from which MSL hired its faculty. (*Id.* at 31A-33A.) Finally, the court found that MSL had not suffered any injury as a result of an alleged boycott by the ABA. (*Id.* at 33A & n.18.) MSL's disagreement with the factual determinations of the court of appeals and the trial court, based in large part on MSL's own admissions (*see, e.g., id.* at 30A-31A, 33A n.18), does not provide a basis for granting its petition.[9]

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[8] MSL's assertion that the decision of the court of appeals leaves the ABA free to fix the level of salaries paid to law faculty (*see, e.g.*, Pet. i, 16 n.10) is simply wrong. In February 1995, the ABA rescinded its accreditation standards that addressed faculty salaries and subsequently agreed, in a consent decree entered into with the Department of Justice, that it would not adopt standards relating to faculty salaries for a period of 10 years. *United States v. American Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996).

[9] In support of its position, MSL repeatedly refers and cites to allegations made by the Department of Justice in its litigation with the ABA. (*See, e.g.*, Pet. 2-9, 11-12, 14-15.) As the court of appeals observed, MSL's reliance on such allegations is misplaced because the Government has never alleged—in that litigation or in the court of appeals—that MSL was injured by the ABA's actions and because the Government's allegations were never proven and thus

4. MSL's remaining allegations are inherently unworthy of review by this Court. First, MSL was allowed broad discovery relating to the grounds on which the district court entered summary judgment. Indeed, under the district court's discovery rulings, *see, e.g., Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837 (E.D. Pa. 1994), MSL took 32 depositions and defendants produced over 70,000 pages of documents, including all documents relating to the ABA's consideration and denial of MSL's application for accreditation. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206 at 2 (E.D. Pa. July 29, 1996). MSL's assertion that "the district judge ruled the ABA had not fixed salaries" and used this ruling to curtail discovery (Pet. 8-9) misrepresents the district court's discovery rulings, as the court of appeals itself noted (Pet. App. 14A-15A).

Similarly, contrary to its assertions (Pet. 5, 28), MSL had the full opportunity to take discovery relating to the ABA's *Noerr* defense and MSL's state-action arguments, *see Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. (E.D. Pa. May 16, 1996) (granting MSL motion to compel), but completely failed to do so—as the district court itself pointed out, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. at 2-3 (July 29, 1996). To the extent MSL complains of needing additional discovery in an attempt to deconstruct state bar admission decisions to determine the impact of ABA accreditation opinions, such an "inquiry runs afoul of the principles guiding the *Parker* and *Noerr* doctrines." *Sessions Tank*, 17 F.3d at 300. *See also Omni Outdoor Advertising*, 499

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cannot be taken as true. (Pet. App. 33A n.19.) *Accord United States v. Microsoft Corp.*, 56 F.3d 1448, 1460-61 (D.C. Cir. 1995). *See also* 15 U.S.C. § 16(h) (consent decree proceedings "shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws").

U.S. at 377-79, 383 (rejecting "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns"); *Hoover*, 466 U.S. at 579-80 & n.34 (rejecting attempt to "look behind" state bar admission decisions).

Finally, MSL's suggestion that it was somehow prejudiced by the district court's order partially disqualifying three MSL faculty members from performing certain functions as counsel (Pet. 9, 28) is frivolous. First, MSL did not allege in the court of appeals that it received incompetent counsel. (Pet. App. 42A.) Second, MSL did in fact retain experienced antitrust counsel.[10] Third, the district court's order was limited in scope and prohibited the relevant individuals only from acting as trial counsel, giving oral argument and deposing witnesses; the district court did not prohibit these individuals from engaging in legal research, formulating discovery, writing briefs, or otherwise using their antitrust expertise on petitioner's behalf. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. (E.D. Pa. Mar. 17, 1994).

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[10] As the district court noted, "[t]he complaint was signed by Harold Kohn, one of America's premier antitrust litigators whose experience includes arguing the seminal antitrust case of [*Noerr*]." *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, No. 93-6206, slip op. at 1 (E.D. Pa. July 29, 1996). In total, MSL retained seven different firms at various times in the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 96-1898

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Massachusetts School of Law ("MSL") submits this Supplemental Brief under Rule 15.8 to describe the recent decision of the D.C. Circuit in the related case of *United States v. American Bar Association and Massachusetts School of Law*, No. 96-5247, decided July 15, 1997, 1997 WL 391603 ("the government's case").[1] That decision, approving the government's consent decree against the ABA while leaving major competitive issues unresolved, enhances the need for a grant of certiorari here.

THE RELATED CASE

In the government's case the Department of Justice ("DOJ") filed a complaint against the ABA making almost all of the same allegations made by MSL. Simultaneously, DOJ filed a consent decree agreed to by the ABA. The impact of the consent decree is limited to future conduct, and it resolves only a limited range of competitive issues. By contrast, the present case seeks both damages for injury caused by past conduct and appropriate equitable relief regarding a broader range of future conduct.

MSL sought to participate in the government's antitrust suit (and obtained amicus status) because it was concerned that the consent decree did not cure a number of the most important restraints of trade charged in the government's complaint. Under the consent decree, MSL would continue to be denied accreditation (by the same actors),[2] even though

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[1] The slip opinion ("slip op.") in the government's case is appended hereto.

[2] Subsequent to the consent decree, the accreditors rejected MSL's efforts to reach a settlement. As a result of a meeting requested by MSL, it became clear that the case could not be resolved on any terms that did

the government, in its brief in the D.C. Circuit (at p.4), described accreditation as "critical to the successful operation of a law school."

After the district court entered the consent decree, MSL sought leave to intervene for purposes of appeal. The district court denied MSL's motion. MSL then contended before the court of appeals that it should have been permitted to intervene for purposes of appeal and that the consent decree was inadequate because in crucial respects it failed to restore competitive conditions.

DOJ acknowledged in its brief before the D.C. Circuit (*id.* at 5) that its "extensive investigation" had uncovered a wide range of anticompetitive practices by the ABA accrediting bodies. DOJ stressed the "critical" importance of these restraints of trade, given the fact that "[i]n over 40 states, bar admission rules make graduation from an ABA-approved law school a prerequisite for taking the bar examination." *Id.* at 4. "The ABA's accreditation rules and process, therefore, can have a considerable influence on the behavior of law schools, including their competitive behavior in a number of markets." *Id.* In particular, "the ABA restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions, and by limiting competition from non-ABA approved schools." *Id.* at 5. The government also found that "the ABA allowed its accreditation process to be captured by those with a direct interest in the outcome [citation omitted]; as a result, the ABA at times acted as a guild protecting the interests of professional law school personnel, rather than as a legitimate

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not force MSL to abandon its educational mission of providing less affluent persons with an opportunity to obtain a quality legal education at an affordable tuition that is only 60 percent of the median tuition of ABA law schools in New England.

accreditation agency setting minimum standards for law school quality and thus providing valuable information to consumers." *Id.*

Given the practical need for government flexibility in settlement negotiations and the deferential standard of appellate review, the D.C. Circuit did not have occasion to consider whether the consent decree fully redressed these problems or removed entry bars to low cost, innovative institutions like MSL. Thus, although the D.C. Circuit did not doubt that MSL advanced a substantial interest in contending that "the ABA's anticompetitive practices have led to denial of accreditation and thus inflicted millions of dollars of injury" (slip op. 7, WL at *4), the court did not decide whether the decree would resolve that issue. Similarly, although the D.C. Circuit stated that "we may assume that the Department brought the suit in order to benefit students who must pay the artificially high price of tuition at accredited law schools" (slip op. 8, WL at *5), it did not consider the uncontroverted fact that the decree has failed to cure this anticompetitive problem because tuitions at ABA schools continue to rise as dramatically as before -- at a rate approximately twice the rate of inflation. Rather than decide whether the ABA's anticompetitive practices have been eliminated, the D.C. Circuit was satisfied that "the decree clearly represents a material accomplishment." Slip op. 13, WL at *8. In this connection the D.C. Circuit made the following observations:

- The court said that, pursuant to the report of a special commission, accreditation rules were changed to allow up to 20% of the faculty component of the student/faculty ratio to be made up of adjunct professors. Slip op. 14, WL at *8. The D.C. Circuit did not consider the uncontroverted fact that the special commission, under whose report the percentage of adjuncts will be *limited* to 20%, had been packed with insiders who were responsible for prior challenged anticompetive

conduct, and that the 20% limitation threatens continued inflation in law school costs and tuitions.

• The court said that the ABA now encourages schools to sponsor bar review courses. *Id.* The court acknowledged, however, that the accreditors continue to preclude schools from requiring such courses or giving them for credit (*id.*), and it did not question the uncontroverted fact that less affluent persons, especially minorities, are harmed most severely by this preclusion.

• The court said the consent decree limits the percentage of deans and faculty on the Council of the Section of Legal Education, its Accreditation Committee, site evaluation teams, and the Standards Review Committee. Slip op. 14, WL at *8. But the percentages of membership changed little under the decree, and many of the "new" members of committees were long-time cartelists who simply switched committee assignments. The court did not consider the uncontroverted fact that the accreditation process has continued to be run by the very same persons who for many years were responsible for the challenged anticompetitive practices.

THE IMPACT OF THE RELATED CASE ON THE PETITION FOR CERTIORARI

MSL's case, now before this Court, is both backward-looking and forward-looking: it seeks damages for financial injury caused by prior anticompetitive acts and it also seeks to terminate those acts in the future.

The government's consent decree is forward-looking only -- it deals only with what shall be done in the future. But after the D.C. Circuit's opinion, the government decree will not contain remedies enabling low cost, innovative schools like MSL to compete free of anticompetitive entry barriers. The

20% limitation on adjunct professors, and the preclusion of required or for-credit bar review courses, remain insuperable bars to effective competition from such schools.[3]

Because there now is no possibility of complete relief being obtained through the government's case, it has become more important than ever for relief to be available in MSL's private suit. As the D.C. Circuit stated, the Antitrust Division has numerous claims on its resources. Slip op. 9, WL at *5. To spread them among competing needs, the Division often must enter compromise decrees that do not totally restore competitive conditions, but that nevertheless cannot be described as "a mockery of judicial power," or a "sell-out," or "malfeasance." Slip op. 13, 14, WL at *8.

For these reasons, this Court repeatedly has held that a consent decree in no way precludes a private suit. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1, 13 (1979). As the government noted in its brief in the D.C. Circuit (*id.* at 15-17), "the terms of the proposed decree will neither bind the MSL, which will remain free to seek relief in other fora, nor establish an unfavorable rule of law." Thus, precisely because the consent decree is necessarily a limited "'step toward eliminating serious anticompetitive practices,'" "MSL is free to litigate elsewhere questions common to the two complaints."

Yet by creating sweeping antitrust immunities that directly conflict with this Court's decisions, the Third Circuit has barred MSL from private litigation that would recompense

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[3] MSL's full-time tuition in the next academic year will be $10,800. The median for ABA schools in New England will be over $18,000. It is thus readily understandable why the accreditors do not want MSL to be able to compete effectively with ABA schools.

past anticompetitive injury and prevent future anticompetitive harm. In the present case, and in the many other contexts in which its decision is applicable, the Third Circuit has confined private parties to only such relief as may be obtained in a government suit. Worse still, the Third Circuit's decision, applied to future government litigation, would bar even state and federal antitrust enforcement officials from achieving the "material accomplishment" embodied in the government's consent decree.

It is now more important than ever, both for the field of legal education and for the many other professional and industrial fields that necessarily fall within the Third Circuit's ruling, for this Court to determine whether the Third Circuit's newly-fashioned immunities can stand.

Respectfully submitted.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 1997 Decided July 15, 1997

No. 96-5247

UNITED STATES OF AMERICA,
APPELLEE

v.

AMERICAN BAR ASSOCIATION,
APPELLEE

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01211)

Lawrence R. Velvel argued the cause and filed the brief for appellant.

David Seidman, Attorney, U.S. Department of Justice, argued the cause for appellee United States of America.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

With him on the brief were *Joel I. Klein*, Acting Assistant Attorney General, *A. Douglas Melamed*, Deputy Assistant Attorney General, and *Catherine G. O'Sullivan*, Attorney.

Roger E. Warin argued the cause for appellee American Bar Association. With him on the brief were *David L. Roll* and *David R. Stewart*.

Before: WALD, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Opinion concurring in the judgment filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: On June 27, 1995 the Department of Justice filed a complaint in district court here against the American Bar Association, alleging that through its control of law school accreditation the ABA had violated § 1 of the Sherman Act by, among other things, fixing law school faculty salaries. Simultaneously, the Department filed a proposed consent decree prohibiting certain conduct and ordering structural changes in the ABA Section on Legal Education. Following the procedure for the entry of consent judgments prescribed by the Tunney Act, 15 U.S.C. § 16(b)-(d)(1994), the Department filed a competitive impact statement with the district court and then published both the statement and the proposed consent judgment in the Federal Register for public comment. Nearly a year later, after several modifications had been made, the district court found the proposed settlement to be in the public interest, see *id.* § 16(e), and entered judgment.

The Massachusetts School of Law at Andover ("MSL" or the "School") is a state-accredited law school that has unsuccessfully sought ABA accreditation. In November 1993 it filed a private antitrust action against the ABA in the Eastern District of Pennsylvania, alleging many of the same anticompetitive practices that the Department later charged the ABA with here. It lost in the trial court and (after this case was argued) on appeal. See *Massachusetts School of Law at Andover v. ABA*, 107 F.3d 1026 (3d Cir. 1997).

Before the district court here MSL objected to the proposed settlement agreement on the grounds that it should go further in remedying the alleged antitrust violations and should contain a more effective enforcement mechanism. MSL also claimed that the Department had failed to, and should be required to, file documents that were "determinative in formulating [the proposed consent judgment]," 15 U.S.C. § 16(b), and that approval of the judgment should be conditioned upon disclosure of information acquired in the course of the Department's investigation.

MSL used a number of channels to advance its position. It submitted written comments in response to the Federal Register publication, as provided for by 15 U.S.C. § 16(d). It moved to intervene in the district court proceedings, and in the alternative to participate as *amicus curiae*. And on entry of judgment, it sought to intervene in the district court for purposes of appeal. The court granted *amicus* status but denied both intervention motions. MSL now appeals from the denial of its motion for intervention for purposes of appeal and from entry of the consent judgment. We affirm the denial of intervention for purposes of appeal, except with respect to the disclosure issue. On the merits of the latter, we find that the district court properly rejected the School's claim that evidentiary material from the Department's investigation should be made public.

* * *

The Tunney Act provides that before a settlement agreement between the Department and a party charged with violating the antitrust laws can take effect, "the court shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e). The court may employ a wide variety of techniques in gathering information about the proposed judgment and coming to a decision, one of which is to allow intervention by interested parties:

> [T]he court may ... authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae,

> intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

Id. § 16(f)(3).

The Act directs us to look to the Federal Rules of Civil Procedure for the legal standard governing intervention. MSL suggests, however, that those rules have no application where intervention is sought solely for purposes of filing an appeal. It notes that 15 U.S.C. § 16(f)(3) speaks of "participation in proceedings before the court," but that, if the district court grants intervention solely for purposes of appeal, no participation whatsoever in the district court will result (disregarding, of course, whatever might occur in the event of a reversal). But even if MSL were right on the narrow issue of 15 U.S.C. § 16(f)(3), that would do no more than remove that provision from consideration, at which point we would go right back to the Federal Rules of Civil Procedure. Although those rules nominally apply only to "procedure in the United States district courts," Fed. R. Civ. P. 1, we apply them—specifically Rule 24—to interventions solely for purposes of appeal. *Smuck v. Hobson*, 408 F.2d 175, 176–82 (D.C. Cir. 1969); see also *United Airlines v. McDonald*, 432 U.S. 385, 390 (1977) (upholding, against claim that attempted intervention was untimely, circuit court decision treating intervention for purposes of appeal as governed by Rule 24).[1] In addition, the Supreme Court has observed that

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[1] MSL cites *United Airlines* for its statement that "[t]he critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395–96. As the sole objection raised before the Court was timeliness, the remark was obviously not intended to state the entirety of the rules governing intervention for purposes of appeal. MSL's reliance on *United States v. LTV Corp.*, 746 F.2d 51 (D.C. Cir. 1984), is equally wide of the mark, as it holds merely that in the absence of a motion to intervene, a non-party cannot appeal; it does not state the opposite—that one who has moved to intervene is automatically entitled to an appeal on the merits.

the Rules' "policies underlying intervention may be applicable in appellate courts," *International Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965), and we have held that intervention *in* the court of appeals is governed by the same standards as in the district court, *Building & Construction Trades Dept. v. Reich*, 40 F.3d 1275, 1282–83 (D.C. Cir. 1994).

The parties have assumed that we review the district court's application of Rule 24 for abuse of discretion. Indeed, that is what we said with respect to intervention in proceedings before the district court in *Building & Construction Trades Dept.*, 40 F.3d at 1282. Although in this case the scope of review makes no difference because of our agreement with the district court, it deserves a brief detour to note some complications.

While in *Building & Construction Trades Dept.* we did not explicitly distinguish between intervention of right and permissive intervention, other courts and even this court have done so in the past. See *Edwards v. Houston*, 78 F.3d 983, 995 (5th Cir. 1997) (en banc); *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 127 n.40 (D.C. Cir. 1972). Yet, except as intervention as of right may be likely to involve more pure issues of law, which would be reviewed *de novo*, cf. *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 894–95 (D.C. Cir. 1988) (explaining that although formula for review of preliminary injunction is abuse of discretion, issues of law are reviewed *de novo*), it is not apparent that that distinction should be important. It would seem that it is only at the level of the particular issue (or sub-issue) that one can make sensible distinctions. Thus, in *Hodgson v. United Mine Workers*, 473 F.2d 118, 125 n.26 (D.C. Cir. 1972), we noted the existence of district court discretion over the timeliness and adequacy of representation issues under Rule 24(a)(2), and over Rule 24(b)(2) determinations generally.

On the other hand, so far as intervention solely for purposes of appeal is concerned, we note that the effect of a decision on such intervention will often be indistinguishable from the effect of a decision on a motion to intervene in an

appeal in the court of appeals, a decision that we necessarily make quite independently and that, as we said in *Building & Construction Trades Dept.*, is governed by the same standards as the district court's decision. It would be paradoxical for us to affirm a district court's denial of intervention for purposes of appeal on deference principles, and then turn around and grant intervention in this court. That paradox of course disappears where only the would-be intervenor seeks to appeal and we affirm the district court's denial of intervention, leaving no appeal in which to intervene; but that leaves a still greater paradox—the court of appeals deferring to the district court on whether to hear an appeal from its judgment. And the paradox is heightened where it turns out that the intervention determination is tied to the merits, as proves the case here. See pp. 11–13 below. Further, for both (intervention for purposes of appeal, intervention in an appeal), the effects are felt—at least initially—in the court of appeals. Finally, we note that our decisions on district court intervention solely for purposes of appeal have by no means always indicated any particular deference, see, e.g., *Smuck v. Hobson*, 408 F.2d at 177–82, nor have those of other circuits, see, e.g., *Romasanta v. United Airlines*, 537 F.2d 915, 917–20 (7th Cir. 1976), *aff'd on other grounds sub nom. United Airlines v. McDonald*, 432 U.S. 385 (1977); *Yniguez v. Arizona*, 939 F.2d 727, 735–37 (9th Cir. 1991) (reviewing timeliness for abuse of discretion but showing no special deference on other criteria), *rev'd on other grounds sub nom. Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1226–29 (6th Cir. 1984). In any event, as we agree with the district court, we need not worry longer about the scope of review.

Intervention as of Right

Anticipating the application of Rule 24, MSL claims that it was entitled to intervene as of right under Rule 24(a)(2) or permissively under Rule 24(b)(2).[2] For purposes of Rule

[2] Although the language of 15 U.S.C. § 16(e) has something in common with other statutory provisions thought to confer a "conditional right to intervene," under Fed. R. Civ. P. 24(b)(1), see, e.g.,

24(a)(2), MSL alleges that it has an interest in the action because the ABA's anticompetitive practices have led to denial of accreditation and thus inflicted millions of dollars of injury.[3] We have little doubt—and the United States and ABA do not question—that this is a substantial interest. Putting aside the disclosure aspects of Tunney Act proceedings, however, we are hard pressed to see how "the applicant is so situated that the disposition of the action may as a practical matter impair or impede [MSL's] ability to protect" the interest, as required under Rule 24(a)(2).

To be sure, we may assume arguendo that the more zealously the Department had pursued its antitrust claims, the greater the resulting *advance* in the School's interest in being free of anticompetitive behavior. But MSL points to no case equating failure to promote an interest with its impairment. At least if we may take the state of the world without the Department's lawsuit as the baseline, mere failure to secure better remedies for a third party (whether because of litigative sloth or some more sinister reason) is not a qualifying impairment. And indeed, our Tunney Act jurisprudence seems to make clear that that is the baseline for the Act's substantive purposes—the district court is not to reject an otherwise adequate remedy "simply because a third party claims it could be better treated." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 n.9 (D.C. Cir. 1995).

Of course one can imagine an antitrust consent decree that would affirmatively set the School's interests back (i.e., "im-

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28 U.S.C. § 2323; 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1911, at 355 (1986), we do not need to resolve the question of whether it qualifies as such. The School does not make that argument and an affirmative finding would here yield a wholly circular exercise; the Tunney Act looks entirely to Fed. R. Civ. P. 24 to supply the legal standard for intervention.

[3] See Motion that the Court Either (A) Grant MSL the Status of Intervenor or, (b) in the Alternative, Grant MSL the Status of Amicus Curiae While Reserving Decision on a Later Grant of Intervenor Status if an Appeal is Sought at 3, *United States v. ABA*, Civil Action No. 95-1211 (D.D.C. Sept. 27, 1995) (Bulky Pleading No. 10).

pair" them). A decree with res judicata, collateral estoppel, or stare decisis effect might very well affect MSL's ability to protect its interests, but as the district court correctly noted the consent decree has no such effect. See Memorandum Opinion, *United States v. ABA*, Civil Action No. 95–1211 (D.D.C. Nov. 1, 1995). A judgment can also set a would-be intervenor back in more subtle ways. In *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), for example, we found impairment in a judgment that *bound* the school board defendants—who chose not to appeal—to adopt certain policies to which the intervenor parents objected. Thus, the judgment impaired their interest in being able to persuade the board to exercise its discretion in favor of policies they preferred. *Id.* at 180–81. At oral argument MSL asserted such an impairment for the first time, saying that because the decree requires the ABA to permit accredited schools to accept transfer students from institutions like MSL (presumably this is tied to the decree provision on transfer credits for courses completed at state-accredited law schools), it has led to an increase in transfers out of MSL. The briefs do not make this claim, however, so the United States and the ABA have had no real opportunity to respond. As our standard rule precludes consideration of a claim raised for the first time in a reply brief absent extraordinary circumstances, see, e.g., *United States v. Whren*, 111 F.3d 956, 958 (D.C. Cir. 1997), this newly asserted hazard cannot support a finding of a material risk of impairment.[4]

Even if we found an interest subject to impairment, we would have to consider whether that interest "is adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2). Certainly the interests of MSL and the United States appear closely aligned. We may assume that the Department brought the suit in order to benefit students who must pay the artificially high price of tuition at accredited law schools,

[4] Further, by facilitating advantageous exit from a state-accredited school, the provision makes entry into such a school more appealing. This effect may well offset the adverse one. Cf. *Shoreham–Wading River Central School District v. NRC*, 931 F.2d 102, 107 (D.C. Cir. 1991).

or who are disadvantaged because they attend law schools denied accreditation because of the alleged § 1 violation. MSL, a law school seeking to compete by offering a lower cost legal education but hindered in its efforts by the alleged wrongful denial of accreditation, is not in the class of consumer beneficiaries; but it would benefit, just as they would, from a greater ability to engage in voluntary, mutually advantageous transactions with them. The primary—perhaps only—divergence apparent between the United States and MSL is that while MSL would like the Department to invest resources in the lawsuit without limit, the Department has other claims on its resources. But we do not think representation is inadequate just because a would-be intervenor is unable to free-ride as far as it might wish—a well-nigh universal complaint. Accordingly, we find no right to intervention under Rule 24(a)(2) for purposes of a general appeal.

MSL's claim of access to documents, based on its interpretation of the disclosure requirement of 15 U.S.C. § 16(b), poses a different question. That section says, among other things,

> Copies of such proposal [for a consent judgment] and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct.

Id. On the broad view of this provision espoused by MSL, once the proposed consent decree was filed they acquired a legal entitlement to access to a wide range of documents in the government's files. The filing of the proposed consent decree, then, triggers a new baseline against which possible "impair[ment]" is to be measured. District court approval of the decree without insistence on such access would set the School back by denying it documents to which it was entitled. Although the School might be able to gain access through discovery in its own antitrust suit, it might well not, given the various privileges that attach to government documents. See, e.g., *Tuite v. Henry*, 98 F.3d 1411, 1415 (D.C. Cir. 1996)

(investigatory and deliberative process privileges). Moreover, the alignment of the Department's and MSL's interests falls completely apart on this issue. MSL hopes for the broadest access in the interest of its own antitrust suit, whereas the Department wants to keep such information confidential to facilitate its ability to investigate possible antitrust violations and negotiate settlements. Accordingly, we find that MSL's motion for intervention for purposes of appeal should have been granted with respect to its record disclosure claims. See *United States v. Alex. Brown & Sons*, 169 F.R.D. 532, 539–40 (S.D.N.Y. 1996) (granting intervention of right in Tunney Act proceeding to move to compel disclosure of settlement documents).

Permissive Intervention

MSL claims in the alternative that it should be allowed permissive intervention under Rule 24(b)(2). First it argues that it sought to prove and remedy some of the very same anticompetitive conduct in its private antitrust suit that is at the heart of this lawsuit, thus satisfying Rule 24(b)(2)'s threshold requirement that the applicant's claim (or defense) have a question of fact or law in common with those of the "main action." The ABA argues that there is no such overlap, because the only substantive issue on appeal is whether the district court properly applied the Tunney Act, an issue that plays no role at all in MSL's independent antitrust claims against the ABA. Insofar as the ABA is saying simply that the search for overlap is a forward-looking exercise, we agree. Here that implies issues alive on appeal and that might be subject to a theoretical remand. But contrary to the ABA's assumption, the issue of Tunney Act compliance does overlap with the underlying merits of the two lawsuits. Although a pre-trial consent decree is necessarily entered without findings of illegal conduct, see *Microsoft*, 56 F.3d at 1460–61, it is certainly possible that the discrepancy between the remedy and undisputed facts of antitrust violations could be such as to render the decree "a mockery of judicial power," *id.* at 1462, and thus require its rejection. In such a case, the upshot would be a remand with at least some prospect of trial on the merits, and the overlap of legal and factual issues in

the two plaintiffs' substantive antitrust claims might produce efficiency gains that in turn might warrant intervention. In this case the overlap on those issues amply satisfies Rule 23(b)(2). For example, the operation of the ABA's Section on Legal Education was the main target of the Department's complaint and is the source of MSL's alleged antitrust injury. See *Massachusetts School of Law at Andover v. ABA*, 107 F.3d 1026, 1031–32.

Once a common question of fact or law is found, Rule 24(b)(2) says that the district court, in exercising its discretion, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The "delay or prejudice" standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not only of the extra cost but also of an increased risk of error. See generally Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 Ga. L. Rev. 701 (1978). The downside of intervention might therefore outweigh the hoped-for advantages—litigative economy, reduced risks of inconsistency, and increased information (which might reduce the risk of error). See *id.* And while intervention nominally for purposes of appeal may permit the court to correct any error made in the district court, it may not easily stop there but may ultimately entail participation in a remand, thereby implying the same drawbacks as intervention in the initial trial proceedings.

At least for intervention for purposes of appeal of a Tunney Act case, the "delay or prejudice" standard of Rule 24(b)(2) appears to force consideration of the merits of the would-be intervenor's claims. If the attempted intervenor shows adequate grounds for upsetting the consent judgment, then delay will be entailed (a remand for further proceedings, possibly including trial), but it would be hard to say that this delay is undue. On the other hand, if the would-be intervenor is unable to show grounds for upsetting the judgment, there

would be no fear of delay—but by the same token no prospect of any gain from intervention. Thus the intervention issue and the merits merge. The result is somewhat similar to National Mediation Board representation certification cases, where we take a "peek at the merits" to determine whether we have jurisdiction to review. See *International Bhd. of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir. 1968).[5]

Although this circuit has no holding on the standard for intervention for purposes of appeal in a Tunney Act case, our treatment of the subject in *United States v. LTV Corp.*, 746 F.2d 51 (D.C. Cir. 1984), meshes well with our recent articulation of our (and the district court's) review of antitrust settlement agreements under the Act. In part because of the constitutional questions that would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review, see *United States v. Microsoft Corp.*, 56 F.3d 1448, 1457–59 (D.C. Cir. 1995), we have construed the public interest inquiry narrowly. The district court must examine the decree in light of the violations charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes "a mockery of judicial power." See *id.* at 1462.

Similarly, when we discussed the standard for intervention in Tunney Act proceedings in *United States v. LTV*, we suggested that compliance with the public interest requirement would be determinative. In that case we made clear

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[5] Apart from any "undue delay" that intervention might bring about, untimeliness in seeking intervention may justify its denial without consideration of the merits. Unlike MSL, some would-be intervenors may inexcusably neglect to try to enter the proceedings before judgment, at a time when notice of their arguments would have enabled the district court to avert the alleged errors. Then, post-judgment intervention for the purpose of challenging those supposed defects on appeal would rightly be denied as untimely. See *NAACP v. New York*, 413 U.S. 345, 366–68 (1973).

that intervention was a prerequisite for challenging a district court's approval of a consent decree. We observed that the would-be intervenor must first establish that its participation would aid the court, 746 F.2d at 54, and went on to cite the language of the Sixth Circuit in *United States v. Hartford–Empire Co.*, 573 F.2d 1, 2 (6th Cir. 1978), a case which occurred after the passage of the Tunney Act but did not discuss it:

> A private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest.

LTV, 746 F.2d at 54 n.7 (quoting 573 F.2d at 2); see also *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) (post-Tunney Act case adopting similar formula without explicit discussion of the Act and also cited in *LTV*). Thus only if the would-be intervenor can point to the specific defects identified by *Microsoft*, or some discrepancy between the remedy and substantially undisputed facts so broad as to render the decree a "mockery of judicial power," will intervention under Rule 24(b)(2) (and reversal) be warranted.

MSL points to nothing that meets this standard. It claims that the decree was deficient in four areas: it failed (1) to lower the high faculty-student ratio required for ABA accreditation, (2) to require the ABA to abandon its ban on for-credit or required bar preparation courses, (3) to ensure the end of secrecy in the accreditation process, and (4) to make the structural changes in the ABA's Section on Legal Education necessary to prevent recurrence of the Sherman Act conspiracy. Of course there is no finding that these practices *were* illegal, and *Microsoft* reminds us that it would accordingly be "inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial." 56 F.3d at 1461. Nonetheless, even as measured by the Department's *complaint*, the decree clearly represents a material accomplishment.

The complaint identified both the first two items as anticompetitive accreditation standards and practices. And the

consent decree was entered only after the ABA took action on each. A report prepared by the ABA Special Commission to Review the Substance and Process of the ABA's Accreditation of American Law Schools and filed with the court by the ABA Board of Governors altered the formula for calculating student-faculty ratio so as to permit part-time and adjunct faculty to count for up to 20% of the faculty component. See United States' Response to Supplemental Public Comments at 23, *United States v. ABA*, Civil Action No. 95–1211 (D.D.C. May 13, 1996). It also changed its practice to encourage law schools to sponsor bar review courses, particularly for students who may be at risk of failing the bar, although it did not alter the rule against required or for-credit bar review courses. *Id.* at 26. Given the entanglement of these issues with educational policy concerns, not to mention the ABA's other defenses, we cannot say that their resolution suggests malfeasance.

As to structural issues, a heading in the complaint asserts that legal educators "Captured the ABA's Law School Accreditation Process," Complaint at 4, *United States v. ABA*, Civil Action No. 95–1211 (D.D.C. June 27, 1995), followed by descriptive details. In fact the decree limited the percentage of law school deans and faculty sitting on the numerous bodies that make up the Section on Legal Education, including the Council, the Accreditation Committee, the Standards Review Committee, and the site evaluation teams (which report to the Accreditation Committee). See Final Judgment at 5–7, *United States v. ABA*, Civil Action No. 95–1211 (D.D.C. June 25, 1996). Finally, although one might logically presume secrecy to be a key tool in pursuit of the alleged conspiracy in restraint of trade, it is never mentioned in the complaint. MSL points out that the Department said in the *proposed consent judgment* that the accreditation process "was kept from public view." See Appellant's Br. at 13. But continuing secrecy, in an otherwise cleansed process, does not necessarily have anticompetitive implications. There is, in short, no reason to infer a sell-out by the Department. Accordingly, MSL does not satisfy the standards for intervention for purposes of appeal.

* * *

We found earlier that MSL could intervene to secure review of the district court's rejection of the claim that the Tunney Act requires the government to disclose whatever documentary evidence it has collected in the course of its investigation. MSL relies first on 15 U.S.C. § 16(b), which provides, in relevant part:

> Copies of such proposal [for a consent judgment] and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct.

15 U.S.C. § 16(b). According to MSL, documents "the United States considered determinative in formulating" the decree include evidentiary material on the defendant's alleged antitrust violations; the government sees the provision as referring only to documents, such as reports to the government, "that individually had a significant impact on the government's formulation of relief—i.e., on its decision to propose or accept a particular settlement." Appellee's Br. at 27. The reference to what "the United States considered *determinative*" seems to point toward the government's view; surely it rules out the claim to *all* the investigation and settlement material, and confines § 16(b) at the most to documents that are either "smoking guns" or the exculpatory opposite. The legislative history in fact supports the government's still narrower reading. Senator Tunney explained, "I am thinking here of the so-called Ramsden memorandum which was important in the ITT case." 119 Cong. Rec. 24,605 (1973). The Ramsden memorandum was a report prepared for the Antitrust Division by an outside consultant analyzing the economic consequences of requiring ITT to divest itself of the recently acquired Hartford Fire Insurance Corporation. The nature of the Tunney Act also cuts against MSL's proposed interpretation. The legislative history displays a firm intent to preserve the government's ability to negotiate settlement agreements, see *Microsoft*, 56 F.3d at 1456, yet a broad

disclosure requirement would directly interfere with that ability. The advantages of settlement to a defendant would be seriously undermined if it were sure to result in a discovery bonanza for private claimants. Cf. *United States v. Alex. Brown & Sons, Inc.*, 169 F.R.D. 532, 541 (S.D.N.Y. 1996).

MSL also invokes 15 U.S.C. § 16(e)(2), which authorizes the court, in determining whether entry of the proposed consent judgment would be in the public interest, to consider "the impact of entry of such judgment upon . . . individuals alleging specific injury from the violations set forth in the complaint." Appellant urges us to read into this provision a section in both the House and Senate Reports stating that:

> The Committee believes that in the majority of instances the interests of private litigants can be accommodated without the risk, delay and expense of the government going to trial. For example, the court can condition approval of the consent decree on the Antitrust Division's making available information and evidence obtained by the government to potential, private plaintiffs which will assist in the effective prosecution of their claims.

S. Rep. No. 93–298, 93d Cong., 1st Sess. 6–7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). This is a lot of weight to give a piece of legislative history that directly conflicts with the congressional intent to preserve the consent decree as a means of resolving government antitrust cases. As MSL's claim of entitlement to the Department's trove of evidence has no other basis, we affirm the trial court's refusal to order it turned over.

Accordingly we affirm the denial of intervention for purposes of appeal, except with regard to the question of whether the Tunney Act requires the government to make evidentiary material available to the public. On the merits of that claim, we find that the Tunney Act does not require that the government give access to evidentiary documents gathered in the course of an investigation culminating in settlement.

So ordered.

WALD, *Circuit Judge*, concurring in the judgment: I concur in the judgment and in most of the reasoning of the panel opinion. I do want to stress, however, that in my view, the application of Federal Rule of Civil Procedure 24(b)(2) in this case responds to the unusual nature of proceedings under the Tunney Act, Pub. L. No. 93–528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 16(b)-(h) (1994)), as well as to the fact that the would-be intervenor here appeals from the denial of a *post-judgment* intervention motion, and that the applicability of a similar analysis outside of this context should not be assumed. This court long ago observed that the language of Rule 24 required "other than literal application in atypical cases." *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (*en banc*). I believe that this is such an atypical case, and that we have therefore properly allowed for a somewhat "non-literal" application of Rule 24(b)(2). Thus, I would not expect our opinion to stand for the proposition that the process of appellate review, or of remand for the correction of errors made by the district court, may generally be treated as factors that "delay or prejudice the adjudication of the rights of the original parties" under Rule 24(b)(2). *Cf.* majority opinion at 11. We treat them as such here so that this court may reserve the discretion to review and correct a district court's "public interest" determination when the record indicates that the determination is contrary to the dictates of the Tunney Act and a non-party well-situated to demonstrate that this is so seeks to subject that determination to appellate review.

No. 96-1898

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

A. ANTITRUST IMMUNITY

1. Both by what it says and what it does not deny, the Brief in Opposition ("Opposition") brings into focus what is at stake here, both for the important field of legal education and for dozens of other professional and business fields involving billions of dollars in commerce annually.

The Opposition does not deny that the Council of the Section of Legal Education and its Accreditation Committee, which make the ABA's accreditation decisions, were captured by economically self-interested academics, or that the captors forced all schools desiring accreditation to adhere to an overall conspiracy which promoted the economic interests of the professoriate in higher salaries and better terms and conditions of work. The Opposition does not deny that the accreditors operated secretly, and used secret rules and procedures that were kept hidden even from the ABA's House of Delegates and Board of Governors. These matters *cannot* be denied: they are the very facts that were found by the Department of Justice ("DOJ") after extensive investigation and that underlie the consent decree entered against the ABA.

The Opposition does not deny that, to enforce their anticompetitive conspiracy, the accreditors used arbitrary procedures, while stacking committees and site evaluation teams. The Opposition does not deny that the terms of the conspiracy stifled competition among ABA-accredited schools and from outsiders seeking accreditation, causing increases in costs and *associated increases in tuition that amounted to thousands of dollars per year per student*. Nor does the Opposition deny that several of these terms were used to deny MSL accreditation.

The Opposition does not deny that state courts did not authorize or supervise the accreditors' conduct, and did not

even know of numerous anticompetitive actions. The Third Circuit could cite no petitions, briefs, letters, conversations, lobbying efforts or other normal methods of petitioning by which the ABA ever petitioned any court for approval of anticompetitive rules and actions challenged by the DOJ and MSL, or explained to courts why restraints of trade were necessary or described the restraints' anticompetitive purposes.[1] The Opposition admits that all the ABA did by way of purported "petitioning" was to send courts a list of accredited schools.[2]

The Opposition thus does not dispute that economically self-interested actors enforced a secret conspiracy to impose economic terms and conditions beneficial to themselves, and that state courts had no input into and no knowledge of anticompetitive actions. Rather, as the Chairman of the Council twice acknowledged recently, the courts simply gave the ABA an "unwritten, implied delegation" of power to decide who can take bar examinations. (App. 280, 2082.)[3]

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[1] The Opposition does not defend the Third Circuit's obviously incorrect ruling that a newspaper interview and an internal ABA debate were indirect petitioning of government.

[2] When the District Court asked the ABA to produce any opinions or advice it gave any court since 1981 relating to who can take bar exams, the ABA admitted "it has no [such] documents." (App. 3617.) Lacking such evidence, the ABA now says the Third Circuit relied on alleged MSL admissions of petitioning. But MSL consistently has contended that there was no petitioning for approval of the challenged restraints, adopted in and after 1973; the only petitioning occurred mainly in the 1920s and 1930s, decades before adoption of the restraints.

[3] In 1983 the Council likewise stated, as shown in a document lodged with the Third Circuit, that it acts under a "delegation" of power "to approve and accredit law schools." Similarly, numerous state judicial opinions have acknowledged that courts give the ABA carte blanche to make decisions. See, e.g., *Appeal of Kartorie*, 406 A.2d 746 (Pa. 1979); *Application of Nort*, 605 P.2d 627 (Nev. 1980); *Application of Schatz*,

2. In a monograph published by the ABA's Section of Antitrust Law, the authors correctly state that "courts tend to deny immunity" under both the state action and *Noerr-Pennington* doctrines "if governmental involvement has been especially narrow or superficial," as here. ABA Antitrust Section, *The Noerr-Pennington Doctrine*, 106 (1993). Yet the ABA — which repeatedly told the District Court it was *not* relying on the state action or petitioning doctrines[4] — now claims both such immunities under the Third Circuit's decision. That decision *concededly* jettisons this Court's requirements of clear authorization and close supervision for state action immunity, as well as the conditions laid down in *Allied Tube* for petitioning immunity. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502-510 (1988). The Third Circuit instead concluded that blanket immunity exists because state bodies took *some* action giving force to the Council's private conspiracy: here that action was the rule requiring accreditation before law school graduates can take bar examinations in over 40 states. Without this rule, ABA accreditation would have far less anticompetitive effect — many schools could ignore the accreditors, as occurs in fields where accreditation and professional licensure are *not* tied together — and law school accreditation would not be, as the DOJ has described it, "critical to the successful operation of a law school." (App. 2876.) According to the Third Circuit, the mere taking of *some* action by courts, and the mere sending to courts of a list of accredited schools, totally absolves the ABA from all liability, even liability for stigmatic injury to which the bar examination rule did not contribute.

The Third Circuit's decision creates great dangers for the

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497 P.2d 153 (Wash. 1972); *Application of Urie*, 617 P.2d 505 (Alaska 1980); *LaBoissiere v. Florida Board of Bar Examiners*, 279 So. 2d 288 (Fla. 1973).

[4] District Court Dkt. Nos. 235, pp. 13-16; 255, pp. 36-38.

economy. The Opposition does not deny that there are many fields in which governmental bodies in some way use, and thereby give force to, private groups' rules on who can enter professional fields and what products can be marketed. In all such cases, economically self-interested persons will be able to impose restraints which destroy competition and innovation for their private benefit, and will be able to do so secretly. Yet the self-interested actors will be immune from liability.

The Third Circuit's decision conflicts with this Court's decisions. This Court has consistently recognized the danger in "hybrid" situations where governments "merely enforce private . . . decisions." *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986). Thus, where government takes some action giving force to private regulatory decisions, this Court has rejected state action immunity unless states clearly authorize and closely supervise the private anticompetitive conduct. The state must play "a substantial role in determining the specifics" of the anticompetive conduct; it cannot merely "cas[t]. . . a gauzy cloak of state involvement over what is essentially a private [agreement];" and immunity requires that *"particular anticompetitive mechanisms* operate because of a deliberate and intended *state* policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 636 (1992)(emphasis added); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

This Court's decisions are intended "to ensure that private parties could claim state-action immunity. . .*only when their anticompetitive acts were truly the product of state regulation"* (*Patrick v. Burget*, 486 U.S. 94, 100 (1988)(emphasis added)), and require courts to distinguish situations where the *state* determines that there should be specific restraints on trade from situations where *private parties* do so. The Third Circuit's decision eradicates this

fundamental distinction.[5] *The decision ousts antitrust review, and destroys its important function of checking private anticompetitive acts which are not overseen by the state. Private parties are left free to destroy competition with impunity.* Significantly, the Opposition does not deny that both private and governmental antitrust enforcement are precluded by the Third Circuit's ruling.

This Court has also rejected *Noerr* immunity where, as here, the context is anticompetitive action "within the confines of a private standard-setting process" by economically self-interested actors who benefit from stifling competition and use improper procedures to achieve their aims. *Allied Tube, supra* at 506. In such cases, the Court said, the conduct at issue is not "'political,'" but rather is "commercial activity with a political impact." *Id.* at 507. Here, of course, secret conduct within a private process was used for the economic purpose of obtaining better salaries and terms and conditions of work.

3. The Opposition's efforts to evade this Court's decisions are untenable. In state action immunity cases, private agreements were *not* independent and self-executing, but often depended entirely on state rules for effectiveness. For example, in *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951), and *Midcal, supra*, privately created price restraints could have been ignored but for state rules requiring adherence. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), state approval was required before the private light bulb program could be undertaken. In *Ticor, supra*, state approval was required before private agreements could be

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[5] In *Hoover v. Ronwin*, 466 U.S. 558 (1984), this Court repeatedly emphasized that the *state court* made the substantive decisions. As stated by Professor Elhauge, "the state supreme court knew and controlled the number of attorneys permitted to enter the profession, *and thus controlled the terms* of the restraint being challenged." Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 694 (1991)(emphasis added).

implemented.

Also untenable under this Court's cases is the contention that all stigmatic injury to MSL is immunized as purportedly "incidental" to petitioning. The Opposition does not deny that, as shown by the evidence, MSL suffered massive damage from heavily declining enrollments attributable to stigmatic injury. Even persons who live and wish to practice in states where MSL graduates can take bar examinations — the type of persons who heavily predominate at MSL — refuse to attend MSL because of reputational injury stemming from denial of accreditation by the national organization which purports to speak for the entire legal profession. This result is congruent with economic theory and common sense, since, as the DOJ said in its *amicus* brief below (at pp. 26-27), consumers rely on professional associations in order to make judgments on complex subjects such as legal education.

As explained in our Petition, however, *Allied Tube* rejected the view that stigmatic injury is "incidental" to petitioning where it stems from economically self-interested anti-competitive action by private persons acting in a private association to further their own interests, rather than in an open political debate in the public arena. *Id.* at 500, 506-507. This holding is all the more applicable where, as here, secrecy rather than disclosure characterized the actions of the defendants, and the purported "petitioning" was only *ex cathedra* presentation of a list of approved schools.

In its *amicus* brief below (at 10), the DOJ also expressed serious concern over expansion of petitioning immunity to protect actions "unrelated to the rationale of *Noerr*," which "is intended to protect the right of the populace to petition the government." *Id.* at 11. *Noerr* thus should not be used (as here) to protect "standards . . . promulgated and applied by economically interested parties who possess the ability to raise barriers to entry or to destroy a rival's ability to compete by misleading consumers" (*id.* at 27), or the ability to "'grossly manipulat[e] public or consumer ignorance for the competitive

and economic advantage of the collaborators . . . .'" *Id.*

The DOJ further explained that immunizing a defendant merely because its "conduct also had an effect on governmental action, *whether or not the private conduct constituted petitioning*, represents a serious and unwarranted expansion of *Noerr*." *Id.* at 8 (emphasis added). Here, the only purported "petitioning" was the sending of a list, and extensive stigmatic injury arose apart from such "petitioning."

The DOJ's position, unlike the Third Circuit's, was that "[t]he First Amendment does not provide blanket protection to restraints of trade effectuated through speech" (*id.* at 8) lest "'[s]uch an expansive interpretation of the constitutional guaranties of speech and press . . . make it practically impossible ever to enforce laws against agreements in restraint of trade . . . .'" *Id.* at 19. This result obtains here under the Third Circuit's decision because, to use the DOJ's words, the accreditors "impair[ed] competition by materially hindering the ability of [the innovative, low cost MSL] to compete and thereby materially diminish[ed] competition...." *Id.* at 28.

4. In addition to contradicting this Court's decisions and views expressed by the DOJ, the Third Circuit's decision is contrary to views expressed by leading commentators. Professor Hovenkamp has said that,"at the very least, before a body can qualify as part of the 'state itself' and thus not be in need of supervision, the effective decision makers must be economically independent of the conduct they are regulating." Hovenkamp, *Federal Antitrust Policy*, 682 (1994). Professors Areeda and Hovenkamp have said that,"when governmental power is placed in essentially private hands — as in a committee of the bar or in a state agency whose officials are themselves essentially full-time participants in the regulated industry — we ask whether the agency is 'really' private or whether the state has left it very little discretion and actually or virtually 'compelled' its decision." "Without reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision

seems required." Areeda and Hovenkamp, *Antitrust Law* (1996 Supp.) 198, 206. Professor Elhauge has repeatedly stated that the relevant "focus [is] on whether the decision-makers controlling the restraints are financially interested." Elhauge, *supra* at 703. And Professors Inman and Rubinfeld state that there must be "[a]ctive legislative supervision of regulatory decisions made by private firms," insuring that state officials not only articulate governing policy but also "have a say in its implementation." Inman and Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, 75 Tex. L. Rev. 1203, 1261 (1997). The Third Circuit's decision sweeps aside all these principles.

B. DISCOVERY AND DISQUALIFICATION

The Opposition confirms that review of the second question presented is appropriate for complete relief. For example:

• In antitrust, evidence of liability is normally in the hands of defendants, and conspiracies are proven by obtaining discovery of the actions by which defendants enforced a conspiracy against members of an industry. The DOJ obtained such discovery. Then, as testified to DOE by the present head of the Antitrust Division, "faced with the evidence the [ABA] quite frankly quite quickly concluded that it was prudent to restructure the process." (*Hearings Before The National Advisory Committee Of DOE*, November 28, 1995, p. 55.) MSL, however, was denied discovery showing the conspiracy even though the Opposition *does not deny* that numerous terms of the conspiracy were used to deny MSL accreditation.[6] This Court should decide whether a plaintiff can be denied discovery of evidence proving the conspiracy it

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[6] *E.g.*, the arbitrary, job-creating student-faculty ratio, limitations on hours of teaching, limitations on types and amounts of work, the requirement of paid leaves of absence, and the requirement of elaborate physical facilities. And MSL concededly was boycotted.

charges.

- The Opposition does not deny that MSL's salaries would have been *an explicitly stated* ground of denial of accreditation had MSL not raised them to levels demanded by the conspirators, and thereby incurred increased costs. This Court should reaffirm its rule that a party which has met conspirators' requirements, and thereby was injured, has a cause of action. *Kelly v. Kosuga*, 358 U.S. 516, 519-521 (1959); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 137-141 (1968).
- Eschewing reliance on arguments made below, the Opposition argues that disqualification of the counsel best able to represent MSL should be upheld because substitute counsel did not descend to the level of incompetence. This unprecedented theory would destroy the right to counsel of one's choice in the federal courts, and should be rejected.

CONCLUSION

Although the Opposition does not deny fundamental points showing what is at stake in this case, it uses a technique used by the ABA against MSL in every court: it opens by lauding ABA accreditation, calling accreditation "a central concern of the ABA" since 1878, portraying MSL as violating 11 accreditation standards, and assailing MSL's alleged litigation and financial strategies. The truth, however, is quite different from this attempt to trade on the ABA's 120 years as the national association of lawyers and its 75 years as an accreditor (roughly half this period as a monopolist).

Because MSL blew the whistle on the antitrust conspiracy imposed by the Council and the Accreditation Committee, almost every one of the practices it objected to has now been found invalid by the DOJ or the DOE. These practices arose because, far from accreditation being a "central concern" of the ABA, "law school accreditation is, in fact, a minor part of what the ABA's members are concerned about," as testified

to DOE by the present head of the Antitrust Division. (*Hearings*, *supra* at 56.) "As a result" accreditation was "captured by the people who were actually immediately affected by it" and who "further[ed] their own . . . guild concerns at the expense of the legitimate accreditation issues." *Id.* at 57.

For the ABA to permit this capture and use was contrary to the decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982). There, this Court recognized that a standards-setting body is "'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce,'" rules which "'may result in economic prosperity or economic failure'" for a host of institutions. *Id.* at 570. The Court therefore ruled trade associations liable for the actions of subgroups, because this would encourage the parent associations to control the subgroups. But the ABA, ignoring *Hydrolevel*, neglected such control for over a dozen years afterwards.

The result is that an innovative school like MSL, which pioneered in teaching practical skills, charging low tuitions, and making education available to people of limited means, was subjected to extensive financial injury by the accreditors. They stigmatized it and, exercising monopoly power, disabled its graduates from taking bar examinations in over 40 states, either permanently or until long years after graduation. The Third Circuit, however, has completely immunized the accreditors and the parent ABA in a decision which contradicts this Court's holdings and threatens other segments of the economy. Certiorari should be granted to reaffirm this Court's rulings (including *Hydrolevel*) and belay the danger to the economy.

Respectfully submitted,

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